APPENDIX

Supreme Court of the United States

October Term, 1973.

No. 73-190.

ISADORE H. BELLIS,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Petition for Certiorari Filed July 27, 1973.

Certiorari Granted October 15, 1973.

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The following are included in the Petition for Certiorari:

APPENDIX.

DOCKET ENTRIES IN U. S. DISTRICT COURT.

May 11, 1973. Motion of Isadore H. Bellis to Quash Subpoena Duces Tecum, filed.

May 11, 1973. Memorandum in support of Motion of Isadore H. Bellis to Quash subpoena Duces Tecum and contra Govt's Motion to Compel the Production of Books and Records, filed.

May 11, 1973. Govt's Memorandum in Re Motion to Compel the Production of Books and Records, filed.

May 9, 1973. HEARING to compel Grand Jury witness to Produce Records, Continued to 5/10/73 at 4 P. M.

May 10, 1973. HEARING RE: Subpoena to produce certain documents

Witnesses Sworn

Order of Court—Mr. Bellis to turn over records to Grand Jury.

May 16, 1973. Memorandum VanArtsdalen, J. and Order that the motion that the Court certify this case for appeal is DENIED and DISMISSED, filed (Dated 5/15/73) 5/16/73 entered and copies mailed.

May 16, 1973. Memorandum Opinion VanArtsdalen, J. in support of bench order issued 5/10/73, filed. 5/16/73 entered and copies mailed.

May 16, 1973. HEARING RE: Govt's Motion for Order of Contempt.

Mr. Bellis held in contempt of Court—Court orders confinement until he supplies information to the Grand Jury or until Grand Jury is Dismissed whichever is sooner.

Mr. Bellis Motion for stay of execution of confinement—GRANTED. BAIL set at $100.00 O. R.

May 16, 1973. Bond in the sum of $100 O. R., filed.

May 17, 1973. Transcripts of Testimony (3 Vols.), filed.

May 21, 1973. Witness Application for Stay of Execution and Release Pending Appeal, filed.

May 21, 1973. NOTICE OF APPEAL OF ISADORE H. BELLIS, A Witness, filed.

May 21, 1973. Copy of Clerk's Notice to U. S. Court of Appeals, filed.

DOCKET ENTRIES IN U. S. COURT OF APPEALS.

June 14, 1973. Copy of Notice of Appeal, rec'd. May 23, 1973, filed.

Record, rec'd. June 11, 1973, filed.

Letter, dated June 12, 1973, from Thomas A. Bergstrom, Esq., U. S. Dept. of Justice, requesting expedited briefing schedule, rec'd. Proof of service in letter.

Order (Clerk) directing that the appeal in this case be docketed and the record filed not later than June 15, 1973; and that counsel for appellant hand file and hand serve legible typewritten brief and the appendix, and counsel for appellee to hand file and hand serve legible typewritten brief, original and 3 copies together with proof of service, not later than June 22, 1973; giving each side leave to file answering briefs, if desired, not later than June 27, 1973, in

legible typewritten form and to be hand filed and hand served; and the Clerk of this court to list this case for disposition on the merits at the earliest convenience of the court, filed.

Appearance of Louis Lipschitz, Esq.; Lipschitz and Danella; and Leonard Sarner, Esq., for appellant, filed.

June 18, 1973. Appearance of Peter F. Vaira and Thomas A. Bergstrom, Esqs. for appellee, U. S. A., filed.

June 22, 1973. Brief for appellant, filed. (4 cc.).

June 22, 1973. Appendix, filed. (4 cc.).

June 22, 1973. Proof of service of appellant's brief and appendix by hand delivery on June 22, 1973 in letter dated June 22, 1973.

June 22, 1973. Brief for appellee, filed. (4 cc.). Certificate of service by mail on June 22, 1973 appears on last page of brief.

June 27, 1973. Reply brief for appellant, filed. (4 cc.). Proof of service by hand delivery on June 27, 1973 in letter dated June 27, 1973.

June 29, 1973. First Supplemental Record (Nos. 12 and 13) rec'd. and filed.

June 29, 1973. Order (*Seitz,* C. J., Gibbons and Hunter) directing that the record in this case shall be supplemented by the forthwith entry by the district court of an order, nunc pro tunc, implementing its finding of civil contempt; when such order is entered it shall be immediately certified to the Court of appeals, filed.

July 2, 1973. CC of above order to C of D. C.

July 2, 1973. Argued. Coram: Seitz, C. J. and Gibbons and Hunter.

July 9, 1973. Opinion of the Court (*Seitz,* C. J., Gibbons and Hunter) filed.

July 9, 1973. Judgment affirming the order of the District Court, filed June 29, 1973 and entered nunc pro tunc as of May 16, 1973. Costs taxed against appellant, filed.

July 9, 1973. Order (*Seitz,* C. J. Gibbons and Hunter) directing pursuant to F. R. App. P. 40(a) that any petition for rehearing which may be filed shall be filed within 4 days after the entry of judgment, filed.

July 12, 1973. Petition by appellant for Rehearing En Banc, filed. (9 copies) service attached.

July 20, 1973. Order (*Seitz,* Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter and Weis) denying appellant's petition for rehearing, filed.

July 23, 1973. Motion by appellant for stay of mandate, filed. (4 cc.). Proof of service attached.

July 23, 1973. Letter dated July 23, 1973 from Leonard Sarner, Esq., counsel for appellant advising Thomas A. Bergstrom, Esq. does not oppose the motion for stay, rec'd.

July 23, 1973. Order (*Seitz,* Gibbons and Hunter) directing that this court's mandate shall issue on July 25, 1973, filed.

July 24, 1973. Order (*Seitz,* Gibbons and Hunter) denying appellant's motion for stay of mandate pending the filing of a petition for certiorari; vacating this Court's order of July 23, 1973, which directed that the mandate of this Court issue in this case on July 25, 1973; and directing that the mandate shall not

issue until August 1, 1973, so that the appellant may have an opportunity to apply to a Justice of the Supreme Court of the United States for a stay of this court's mandate, filed.

August 3, 1973. Notice of filing on July 27, 1973 of petition for writ of certiorari, rec'd from Clerk of Supreme Court, filed. (S. C. No. 73-190).

August 6, 1973. Certified copy of order dated August 1, 1973 (Mr. Justice White) staying the issuance of the mandate of the Third Circuit pending Supreme Court disposition of the petition for writ of certiorari now on file in the Supreme Court; should the petition for certiorari be denied, stay is to terminate automatically; should the petition for certiorari be granted, the stay will remain in effect pending the sending down of the judgment of the Supreme Court of the United States, rec'd from Clerk of Supreme Court, filed. (Supreme Court No. 73-190) (A-146)).

August 1, 1973. Certified copy of appendix and proceedings in this Court forwarded to Clerk of Supreme Court.

August 6, 1973. Order (*Clerk*) directing that the original District Court Record in the above-entitled case be transmitted to the Clerk of the Supreme Court of the United States, filed.

August 6, 1973. Certified copy of above order to C. of S. C.

August 6, 1973. Original District Court record and first supplement in D. C. Misc. No. 73-95, papers 1 thru 13 forwarded to Clerk of Supreme Court.

October 18, 1973. Certified copy of order dated October 15, 1973, rec'd from Clerk of Supreme Court granting petition for writ of certiorari, filed. (S. C. No. 73-190).

SUBPOENA TO PRODUCE DOCUMENT OR OBJECT

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

MISC. No. 71-295

UNITED STATES OF AMERICA

v.

GRAND JURY INVESTIGATION

To Isadore Bellis
709 Medary Aevnue
Philadelphia, Pa.

You are hereby commanded to appear in the United States District Court for the Eastern District of Pennsylvania at Room 209, 928 Market Street in the city of Philadelphia on the 9th day of May 1973 at two o'clock A. M. to testify in the case of United States v. GRAND JURY INVESTIGATION and bring with you all partnership records currently in your possession for the partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969.

This subpoena is issued upon application of the United States of America.

April 26, 1973.

ROBERT E. J. CURRAN
Attorney for United States
4042 U. S. Courthouse
Address Philadelphia, Pa.

JOHN J. HARDING,
Clerk.
By B. R. MANTON,
Deputy Clerk.

RETURN

Received this subpoena at Philadelphia, Pa. on 5/1/73 and on 5/1/73 11:30 A. M. at City Council, City Hall, Phila., Pa. served it on the within named by delivering a copy to him.

By JOHN P. COOPER,
Special Agent.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES GRAND JURY

Wednesday, May 9, 1973

Proceedings taken before the United States Grand Jury, in the Grand Jury Room, 928 Market Street, Philadelphia, Pennsylvania, on Wednesday, May 9, 1973, beginning at 1:00 o'clock p.m.

APPEARANCES: THOMAS BERGSTROM, ESQ.

Representing the United States Department of Justice.

The Grand Jury Foreman: You do swear that the evidence you shall give to the Grand Inquest in the matter now pending shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Isadore Bellis: I do.

ISADORE BELLIS, having been duly sworn, was examined and testified as follows:

[2]

Q. Would you please state your name, sir, and spell your last name for the record?

A. Isadore Bellis, B-E-L-L-I-S.

Q. And what is your address?

A. 709 and 711 Medary Avenue.

Q. Is that in the City of Philadelphia?

A. Yes.

Q. Now, Mr. Bellis, are you here today pursuant to a Grand Jury subpoena by this Federal Grand Jury—the people sitting in front of you are the Grand Jurors—are you here today pursuant to a subpoena issued by this Federal Grand Jury to appear before the Grand Jury on the 9th day of May, 1973 at one o'clock p.m. and to bring with you certain records, namely all partnership records currently in your possession for the partnership of Bellis, Colsby and Wolf for the years 1968 and 1969?

A. Such a subpoena was served on me.

Q. And are you here today pursuant to that subpoena, sir?

A. Yes, I am.

Q. Now, Mr. Bellis, have you brought with you the records that the Grand Jury has asked for in the subpoena, specifically as detailed?

[3]

A. I did not on the grounds that under the Constitution of the United States, particularly but not limited to the First, Fourth, Fifth, and Sixth amendments and the Constitution and laws of Pennsylvania, I can not be compelled to be a witness against myself, and the books and records may contain private, testimonial and personal statements and information which might be considered as so doing.

All of which Counsel has advised me and on which advice I rely would give me the right to refuse production of the records and books you referred to or answering any questions in connection with them.

Q. Now, are you represented by Counsel, sir?

A. Yes.

Q. And who are you represented by?

A. Mr. Louis Lipshitz, and assisting him, Mr. Leonard Sarner.

Q. Now, I take it, Mr. Bellis, from your response, although you are unwilling under the First, Fourth, Fifth, and Sixth amendments to the United States Constitution, to produce the documents; I take it from your response that you do have possession of

[4]

those documents?

A. I will not answer that question on the grounds that under the Constitution of the United States, particularly but not limited to the First, Fourth, Fifth, and Sixth amendments, and the Constitution and laws of Pennsylvania, I can not be compelled to be a witness against myself or give evidence against myself, and what you are asking, the response to it may be private, testimonial, and personal in nature, and the information which may be, according to Counsel on which advice I rely gives me the right to refuse production of the records and gives me the right to refuse to answer your question.

Mr. Bergstrom: Now, Madam Forelady, would you please direct Mr. Bellis along with his Counsel, Mr. Lipshitz and Mr. Sarner, to proceed to Courtroom Number 15 on the third floor of the Federal Courthouse where Judge Van Artsdalen is sitting so that we may present to him this matter?

Would you please direct the witness to appear in Courtroom Number 15 on the third floor?

The Grand Jury Foreman: Mr. Bellis,

[5]

I direct you and your attorney to appear at Courtroom Number 15 on the third floor to appear before Judge Van Artsdalen.

Mr. Bergstrom: And we'll do that right now.

(The witness was dismissed for appearance at Courtroom Number 15 at 1:05 p.m.)

This is to certify that the attached proceedings before the United States Grand Jury, at 928 Market Street, Philadelphia, Pennsylvania, on Wednesday, May 9, 1973, were held as herein appears, and that this is the original transcript thereof for the file of the Department.

ALFRED W. KERSHAW,
Court Reporter.

Reported By:
Alfred W. Kershaw

GOVERNMENT'S MEMORANDUM IN RE MOTION TO COMPEL THE PRODUCTION OF BOOKS AND RECORDS.

COMES Now the United States of America by ROBERT E. J. CURRAN, United States Attorney, Eastern District of Pennsylvania, and THOMAS A. BERGSTROM, Special Attorney, United States Department of Justice and moves this honorable court for an order compelling ISADORE H. BELLIS to comply with a federal Grand Jury subpoena and produce certain books and records demanded therein. A copy of said Grand Jury subpoena is attached hereto. In support of its motion the Government respectfully avers as follows:

(1) On April 24, 1973, Mr. ISADORE H. BELLIS was served with a federal Grand Jury subpoena commanding him to appear on May 9, 1973 before said federal Grand Jury and produce certain books and records named in the attached subpoena. On May 9, 1973, Mr. BELLIS appeared before the said Grand Jury and refused to produce those books and records demanded, asserting his privilege against self-incrimination under the Fifth Amendment to the United States Constitution.

(2) In order for this honorable court to determine the issue presented the Government represents the following facts to be controlling:

(a) In approximately September 1969 Mr. ISADORE H. BELLIS terminated his partnership relation with the law firm of Bellis, Kolsby and Wolf, Philadelphia, Pennsylvania, and as of January 1, 1970 the new ongoing partnership of Kolsby and Wolf was formed which continues in existence today. During the years that the law firm of Bellis, Kolsby and Wolf existed and specifically for the years 1968 and 1969 certain books and records were kept and maintained in the offices of Bellis, Kolsby and Wolf.

When Mr. BELLIS terminated his partnership relationship to form the new law partnership of Cohen, Bellis and Verlin, the books and records of Bellis, Kolsby and Wolf remained with the ongoing existing partnership of Kolsby and Wolf.

(b) During April, 1973 a request was made to the law firm of Kolsby and Wolf to examine the partnership records of Bellis, Kolsby and Wolf for the years 1968 and 1969; authorization was given by Mr. Herbert F. Kolsby and Edward L. Wolf on behalf of Kolsby and Wolf for the federal Grand Jury to examine those records. It appears, however, that subsequent to their authorization both Messrs. Kolsby and Wolf realized that all of the partnership records of Bellis, Kolsby and Wolf and specifically those records for the years 1968 and 1969 were removed from their office sometime in late February or early March 1973, at Mr. Bellis' direction. A demand has been made upon Mr. BELLIS by Kolsby and Wolf to return the records, however to no avail.

(c) As of May 2, 1973, the law firm of Kolsby and Wolf continues to authorize the federal Grand Jury to examine the partnership records of Bellis, Kolsby and Wolf for the years 1968 and 1969.

(3) The central issue therefore is whether or not a former partner, to wit ISADORE H. BELLIS, may assert a Fifth Amendment privilege in regard to the production of partnership books and records, wherein the existing partnership, and lawful owner of those records, has specifically waived such privilege. Indeed, whether or not these books and records are the proper subject of a Fifth Amendment assertion at all is questionable in light of the Supreme Court's recent decision in *Couch v. United States*, 93 S. Ct. 611 (1973). In that case petitioner, Couch,

claimed a Fifth Amendment privilege in re certain books and records that had been released to her accountant. The Court held that the Internal Revenue Service could summon a taxpayer's records possessed by an accountant, thereby deciding that there was no accountant-client privilege, however, in addition the court specifically held that the production of these records would not be violative of either the Fourth or Fifth Amendment as there was never an expectation of privacy in these records since the information contained therein would necessarily have to be disclosed on petitioner's Federal income tax returns. The court speaking through Justice Powell stated in regard to this issue,

> "Nor is there justification for such a privilege where records relevant to income tax returns are involved in a criminal investigation or prosecution. In *Boyd,* a pre-income tax case, the Court spoke of protection of privacy, 117 U. S., at 630, but there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return. What information is not disclosed is largely in the accountant's discretion, not petitioner's. Indeed, the accountant himself risks criminal prosecution if he knowingly assists in the preparation of a false return. 26 U. S. C. § 7602(2). His own need for self-protection would often require the right to disclose the information given him. Petitioner seeks extensions of constitutional protections against self-incrimination in the very situation where obligations of disclosure exist and under a system largely dependent upon honest self-reporting even to survive. Accordingly, petitioner here cannot reasonably claim,

either for Fourth or Fifth Amendment purposes, an expectation of protected privacy or confidentiality."

In the case before us, it would certainly seem that there was no expectation of privacy in that the records in question were owned and in the possession of the new partnership from September 1969 until approximately February 1973. After withdrawal by Mr. BELLIS from the old partnership, possession, ownership and expectation of privacy all seem to have been abandoned or relinquished to the new partnership and his (BELLIS') reacquisition of those records in February 1973 was apparently in violation of the rights of the new partnership. In following the theory propounded in *Couch* the original partnership of Bellis, Kolsby and Wolf could have had no real expectation of privacy in these records (partnership receipts for the years 1968 and 1969) as that information was subject to disclosure on Federal income tax returns. However, there is no need to expand *Couch* to its logical conclusions in light of the partnership authorizing disclosure and specifically waiving their privilege.

In *Peelman v. United States,* 247 U. S. 7 (1918), the Supreme Court held the privilege unavailable to a party seeking to suppress the admission of documents and exhibits before a Grand Jury. The court held specifically that the movant's expectation of privacy in the documents had been destroyed by a previous surrender. Such would appear to be the case here, as Mr. BELLIS surrender whatever rights he had to the partnership records when he terminated his existence in the partnership.

The case of *United States v. White,* 322 U. S. 694, 1944 is dispositive of the claim that a mere possessory interest brings papers and documents within the ambit of a witness' Fifth Amendment privilege. However, where,

as here, a third party (to wit: the existing partnership) has a superior right to possession of documents, the witness cannot withhold them. *United States v. Egenberg,* 443 F. 2d 512 (Ca. Third Circuit 1971). In the *Egenberg* case the Third Circuit went on to say:

> "This is the view expressed in the American Law Institute Model Code of Evidence, Rule 206:
>
> > 'No person has a privilege under Rule 203 [self-incrimination] to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control constituting, containing or disclosing matter incriminating him if the judge finds that, by the applicable rules of the substantive law, some other person or a corporation, or other association has a superior right to the possession of the thing ordered to be produced.'
>
> One other group of cases is worthy of note. It has been held that even personal papers must be surrendered to a trustee in bankruptcy by a bankrupt despite the fact that they may incriminate the bankrupt. *Ex parte Fuller,* 262 U. S. 91, 43 S. Ct. 496, 67 L. Ed. 881 (1923). Those personal papers, transferred to the trustee by operation of the substantive law of bankruptcy, may be used against the bankrupt in a criminal case. *Johnson v. United States,* 228 U. S. 457, 33 S. Ct. 572, 57 L. Ed. 919 (1913). This is true despite the fact that the bankrupt may assert the privilege by refusing to testify in a bankruptcy proceeding. *McCarthy v. Arndstein,* 266 U. S. 34, 45 S. Ct. 16, 69 L. Ed. 158 (1924). The bankruptcy trustee's superior right to possession removes even personal papers from the *Boyd* rule.

Thus the *Boyd* rule operates in the narrow area of personal papers to which the witness has the right of possession in a personal capacity. It does not apply to papers of third parties held for a temporary agency purpose."

The *Egenberg* decision has been recently followed by this district in the case of *United States v. Fisher*, 72-2 U. S. T. C. 85, 662 (E. D. Pa. 1972) wherein Judge Davis held, in ordering the production of documents, that where a third party has a superior right to possession of the documents, the witness cannot withhold them. The privilege provided by the Fifth Amendment extends only to personal records. *Boyd v. United States*, 116 U. S. 616 (1886). The following cases support the proposition that the Fifth Amendment privilege does not extend to partnership records which are not personal in nature, and that they may therefore be the proper subject of a summons or subpoena. *In Re Mal Bros. Contracting*, 444 F. 2d 615 (Ca. Third Circuit 1971), *United States v. Silverstein*, 314 F. 2d 789 (Ca. Second Circuit 1963); *United States v. Silverstein*, 237 F. Supp. 446 (S. D. N. Y. 1965); *United States v. Quick*, 336 F. Supp. 744 (E. D. N. Y. 1972). *United States v. Onassis*, 125 F. Supp. 190 (D. C. Dist. of Columbia 1954).

There are two contrary cases in regard to partnership records, however clearly distinguishable from our present situation. In *United States v. Cogan*, 257 F. Supp. 170 (S. D. N. Y. 1966) and *United States v. Slutsky*, 73-1 U. S. T. C. 80, 291 (S. D. N. Y. 1972) the Fifth Amendment privilege was upheld in regard to partnership records. However in both cases it appears that the existing partnership was exercising the privilege in regard to the partnership records and the records sought were personal in nature. Such is clearly not the case here.

In *United States v. Onassis,* 133 F. Supp. 327 (S. D. N. Y. 1955) which deals with a situation where an attempt was made to subpoena partnership records through one partner which would incriminate another partner. The partner who would be incriminated, Augenthalen, was not subpoenaed. The partner who was subpoenaed was given immunity. The Court cited the propositions that a person subpoenaed may not decline to testify or to produce a record in his possession because of possible incrimination of a third person, and that the owner may not raise his privilege against self-incrimination, under the 4th and 5th Amendments, to prevent the production of his private records in the possession of the third person. 133 F. Supp. at 330.

In *Onassis,* all the parties involved were partners in an ongoing concern. The Court said, "Augenthalen, as a partner, has no power to use or suppress these records as his personal property. He has a property interest in them as a tenant in a partnership. He has the right of access to them. That is all. He has no right to exclusive possession." 133 F. Supp. at 331-332.

As the Government maintains in the case in the instant situation, the Court in *Onassis* held that the fact that the records are of a partnership is not of necessity controlling. "They are not his private records." 133 F. Supp. at 332.

Under the law enunciated in *Onassis,* Bellis' partners could have been subpoenaed to produce partnership records over his opposition if they in fact had the records in their custody, however, the records are in Mr. Bellis' custody and perhaps wrongfully so; therefore it does not follow that Bellis should be allowed to assert his 5th Amendment privilege to prevent the production of records, when he perhaps holds them wrongfully and with no prop-

erty interest. His partners have consented to their production, as they are records of a firm which Bellis no longer has a legal interest in. Bellis surely cannot assert an illegal self-help measure as providing him 5th Amendment standing; civilly he might be sued by his partners for conversion or replevin.

In *Sanderson v. Cooke,* 175 N. E. 518 (N. Y. 1931), the leading non-federal case dealing with the books and records of a dissolved partnership, the Court discussed the rights of a former partner in the new partnership. The plaintiff was a former partner of the Defendant's and sought to examine the books of account of the old partnership. The Court stated that the general rule that all partnership books should be kept open to inspection at all reasonable times, even after dissolution, did not necessarily apply in the case before it. "We are not treating here, however, with a partnership in existence, a going concern . . . Whatever may be the property right of a partner in the partnership books, he may transfer and dispose of it like his right to any other bit of property by express, or necessarily implied, agreement." 175 N. E. at 520. The Court stated that where a former partner parted with his interest by sale, he would have no interest in the new partnership, nor in the books.

The Court declared, "there is no law which compels one partner on dissolution to continue the business for the sake of keeping the books and preserving them for the inspection of the other partner." It further stated that the law requires only that partnership books be kept at the principal place of business and be made accessible to partners of a *going* firm, and that there is no duty on the purchaser to keep the books of the prior concern. 175 N. E. at 520. The Court found that the property interest in the assets of the old firm (including the books) passed to the new

firm and that the books, records and files were necessary for the continuance for the new firm. The Court stated of the plaintiff "He knew that the business could not be carried on without all the books, accounts, papers and files of the previous general partnership. He knew, also, that the books of the old firm were not physically closed and laid aside for preservation . . . one book might have the entries of the former general partnership and also the entires of the new limited partnership . . ." and that "when he became a special partner, he ceased to have any interest in the assets, and among the assets of the new limited partnership were the books, records, etc. demanded in this case." 175 N. E. at 521.

The Court further stated, "to transfer the accounts which constituted the business, without the records of the accounts, appears to be meaningless." 175 N. E. at 522. It concluded that the plaintiff has transferred its property interest to the new firm and therefore had no absolute right to examine the books of the firm, be they considered of the "old" or "new." The Court said of the books, "His property interest in them has ceased." 175 N. E. at 522.

The Government maintains that the same situation exists in the instant case. Bellis was once a partner, but in September 1969 withdrew from the partnership. At that time his interest in the new partnership ceased and his property right in its assets and books also ceased. The books and records of the "old" firm were used by the "new" firm. In fact, they were necessary for the business as in *Sanderson, supra.* Thus, Bellis has no right to hold these books as he now does, as they are the property of the new partnership, in which he holds no interest. They are not personal records, but records of business transactions of the firm. While Bellis may be *permitted* to examine them, he has no *right* to do so. Certainly, he has no right to have physical custody or possession of them.

(4) In light of the foregoing, it would appear that Isadore H. Bellis does not have a superior possessory or property right in the books and records in question; that authorization has been given, by the party with that superior right, to examine those books; that they are not the private, personal books and records of Mr. Bellis, and that he has not, nor did he ever have a legitimate expectation of privacy therein. In conclusion, therefore, the Government respectfully urges this Honorable Court to order Isadore H. Bellis to comply with the provisions of the attached Grand Jury subpoena.

Respectfully submitted,

ROBERT E. J. CURRAN
United States Attorney
Eastern District of Pennsylvania
THOMAS A. BERGSTROM
Special Attorney
United States Department of Justice

MOTION TO QUASH SUBPOENA DUCES TECUM.

To the Honorable Donald W. Van Artsdalen, Judge of the United States District Court:

Isadore H. Bellis, by his attorneys, Louis Lipschitz and Leonard Sarner, Esquires move the Court to quash the subpoena duces tecum served upon him in connection with the above matter as follows:

1. Isadore H. Bellis, by Grand Jury Subpoena Duces Tecum addressed to him, was commanded to produce "all partnership records currently in your possession for the partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969".

2. On May 9th, 1973, Isadore H. Bellis appeared before the Grand Jury, invoked his privilege against self-incrimination under the 1st, 4th, 5th and 6th Amendments of the Constitution of the United States and the Constitution of Pennsylvania, and did not produce the records.

3. The government has moved for an Order compelling compliance; Isadore H. Bellis resists the motion and asks that the subpoena duces tecum be quashed.

4. Isadore H. Bellis respectfully submits:

A. The privilege which he claims is available to him as a former member of the partnership in question;

B. That the partnership papers that Isadore H. Bellis is alleged to have withheld are his personal and private papers and entitle him to assert his rights under the Constitution of the United States as aforesaid;

C. That these are not impersonal records and may contain private testimonial and personal information disclosure of which may be in violation of his rights as aforesaid;

D. That he has all of the rights of ownership and possession and that no one is authorized to waive any of his personal rights nor does anyone have any rights superior to his.

WHEREFORE, petitioners pray that the Subpoena Duces Tecum served upon Isadore H. Bellis requiring him to produce the partnership records of Bellis, Kolsby & Wolf for the years 1968 and 1969 be quashed.

Respectfully submitted,

LOUIS LIPSCHITZ,
LEONARD SARNER.

MEMORANDUM IN SUPPORT OF MOTION OF ISADORE H. BELLIS TO QUASH SUBPOENA DUCAS TECUM AND CONTRA GOVERNMENT'S MOTION TO COMPEL THE PRODUCTION OF BOOKS AND RECORDS.

Louis Lipschitz, Esquire and Leonard Sarner, Esquire, counsel for Isadore H. Bellis, the above named, file this Memorandum in support of the Motion of Isadore H. Bellis, to quash subpoena ducas tecum and contra the Government's Motion to compel the production of books and records.

1. *The books and records may tend to incriminate Petitioner.*

The books and records of the Bellis, Kolsby & Wolf, law partnership, may contain private and personal statements and declarations which may tend to incriminate Petitioner. They could contain records of receipts which Petitioner authorized to be included therein but which the Government may claim were not included in his tax returns. Likewise, the failure of said books and records to contain a record of a receipt which the Government may claim Petitioner, in fact, received in connection with his law partnership could also tend to incriminate him on a theory that it was omitted from his tax return. Finally, the records could disclose the source of funds received which the Government may claim would be for a purpose in violation of some federal or state or local law.

Accordingly, the Government's reliance on the *Couch* case is entirely misplaced. In the *Couch* case, the books and records were delivered to the taxpayer's account for purposes of preparing his income tax return. It is true that where supporting documents are delivered to an accountant

to aid in the preparation of the tax return, there has been no confidential disclosure whether to an accountant or to an attorney. But, in the instant case, the books and records sought by the Government have in no way been delivered by Petitioner to anyone for purposes of use or disclosure. Under the Government's theory, they remain in the possession of Petitioner and they may contain material completely unrelated to information which would have to be disclosed on Petitioner's federal income tax returns, but which Petitioner desires not to disclose because it may incriminate him. Cf. *U. S. v. Cote,* 456 F. 2d 142 (CA 8, 1972).

2. *The partnership books and records are covered by the privilege.*

The law partnership of Bellis, Kolsby & Wolf consisted of three law partners, one fulltime attorney-employee, occasionally a parttime attorney-employee, a receptionist-telephone clerk and three secretaries. Obviously, it was not the type of impersonal organization akin to a corporation described in the *White, Mal Brothers, Silverstein* and *Onassis* cases relied upon by the Government. Furthermore, the *Quick* case also cited by the Government involve the absence of a showing which is present in the instant case, that the records could be personal enough to incriminate the movant.

On the other hand, the *Cogan* and *Slotsky* cases sought to be distinguished by the Government, clearly involves small personal partnerships such as the one involved in the instant case where the books and records are clearly held to be within the protection of the Fifth Amendment. To these cases may be added *U. S. v. Lawn,* 115 F. Supp. 674 (SD NY 1953) and *U. S. v. Schoendorf,* 454 F. 2d 349 (CA 7, 1971) in which the latter case, it was assumed that if a law partnership did exist between the movant and his

brother and father, the privilege to withhold the books and records of the group would have been upheld.

3. *Dissolution of the Partnership.* The Government's contention that dissolution of the Bellis, Kolsby & Wolf law partnership serves to distinguish the authority of the *Cogan* and *Slotsky* cases or gives added weight to its argument that no privilege exists with respect to the books and records of the former partnership would seem to be completely without merit. In the first place, dissolution is only a technical concept when the parties no longer associate as partners. However, there is a long period of winding up and liquidation and cases are being processed and funds being received on work in progress at the time the parties dissolved the partnership with distribution of funds being made between them on their former partnership basis.

More important, the Government has the argument backwards. It has been argued on behalf of Petitioners that dissolution of a corporation and the transfer of its books to individual stockholders gives the transferees a greater privilege with respect to the former corporate records than existed during the operation of the corporation. This has been rejected. See *Curcio v. U. S.*, 354 U. S. 118 (1957). But it has never been successfully argued that the dissolution gives the transferees any lesser privilege when they now own the books and records more in an individual capacity than before as is true in the instant case. Hence, the Government should get no comfort from the fact that the Bellis, Kolsby & Wolf partnership is allegedly dissolved since this could not take away but only could add to the rights of Petitioner.

4. *The Government's right to stand in the shoes of the other partners in requesting the books and records.*

The Government also seeks comfort in the fact that Messrs. Kolsby and Wolf allegedly have authorized the

Federal Grand Jury to examine the partnership records of the partnership or that these two former law partners have requested Petitioner to turn over the records to them. Whatever may be the rights of Messrs. Kolsby and Wolf vis-à-vis Petitioner, *U. S. v. Cohen,* 388 F. 2d 464 (CA 9, 1967) supplies the short and direct answer. In the *Cohen* case, the Government sought to obtain from the taxpayer workpapers which his accountant had delivered to him. At the request of the Government, the accountant asked that his workpapers be returned. The taxpayer refused and the Court in denying the enforcement of the subpoena, said:

> "It is difficult to see how this conclusion could be affected by the fact that the papers were owned by another who had the right to demand their return. The owner's demand would not involve compulsion by the state, and compliance with it would not incriminate the possessor. The considerations upon which the right depends therefore would not apply, even though the documents might thereafter be obtained by the government from the owner. '[T]he sentiments which bar the *state* from requiring a person to deliver to it a self-incriminating document are logically unrelated to the fact that someone *else,* using methods and for reasons not giving rise to those same sentiments, can require the person to deliver up the document to that someone else.' 8 Wigmore, Evidence § 2259b, at 360 (McNaughton rev. 1961)."

5. *Ownership and possession in Petitioner.*

Finally, unlike any of the cases relied upon by the Government, there is no question that Petitioner is a rightful owner of the books and records sought by the Government and that under the Government's theory, he has pos-

session of them. Hence, we do not have in the instant case, any problems suggested in *Couch* of a division between ownership and possession. Ownership and possession, for purposes of this Motion, must be deemed in Petitioner, no one has a superior possessory or property right in the books and records. They contain the private and personal testimonial declarations and statements of Petitioner which he always had a legitimate expectation of keeping to himself. In fact, as long ago as 1969, the Department of Justice admitted that it had refrained from making the argument that a taxpayer was not protected from production of his own records. See *Steuart v. U. S.*, 416 F. 2d 459 (CA 5, 1969). It is surprising that the Department of Justice now appears to be making the same discarded argument.

It is respectfully submitted that the Motion to Quash should be granted and the Motion of the Government to Compel Production of the Books and Records denied.

Respectfully submitted,

LEONARD SARNER, Esquire,
LOUIS LIPSCHITZ, Esquire,
Attorneys for Isadore H. Bellis.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Miscellaneous
No. 73-95.

IN RE:

GRAND JURY INVESTIGATION
ISADORE H. BELLIS, A WITNESS.

Philadelphia, Pa., May 9, 1973.

Before HON. DONALD W. VAN ARTSDALEN, *J.*

APPEARANCES:

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for Isadore H. Bellis.

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Mr. Bergstrom: Your Honor, we have one other matter.

A witness, Mr. Isadore H. Bellis, was subpoenaed to appear before the Grand Jury at 2:00 P. M. this afternoon. Mr. Bellis showed up early, he showed up at 1:00 o'clock, and Mr. Bellis was served with a Grand Jury subpoena on approximately April 24, 1973, which commanded him to appear before the Grand Jury and to bring with him certain books and records.

Now, for the purposes of this hearing, Your Honor, I would request that Your Honor allow us under Rule 6(e) to break the secrecy of the Grand Jury just for the purposes of this hearing so that I can convey to the Court exactly what took place within the confines of the Grand Jury while Mr. Bellis was present.

There was actually no testimony taken, sir.

The Court: I am wondering whether it is necessary to do that.

Is Mr. Bellis represented by counsel?

Mr. Lipschitz: I and Mr. Sarner represent him, sir.

The Court: All right.

I am wondering whether counsel may be able

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to agree as to what the facts were that took place before the Grand Jury that brings this matter to the Court's attention.

Mr. Lipschitz: I think we probably can, if Your Honor please, without relying on Rule 6(e) to make any disclosures.

I suggest to Your Honor that in spite of what we say here the disclosures are being made of matters which may occur before the Grand Jury.

If Your Honor read yesterday's paper Your Honor would see that one of the newspapers on the front page came out with an article which indicates that they have the very information that Your Honor is trying to keep secret from the public.

The Court: I beg your pardon. I am not trying to——

Mr. Lipschitz: No, I am not saying that Your Honor is trying—that the Government feels obligated to keep secret from the public, and we are just curious to know how the newspapers, we have to rely on the newspapers to get information which normally would come from counsel for the other side and it intrigues us greatly.

The Court: That may be but I don't think that is a matter presently before me.

Mr. Lipschitz: No, if Your Honor please.

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I just got to that point.

Mr. Bergstrom: Your Honor, it would seem to me that we ought to be able to agree that Mr. Bellis himself did appear before the Federal Grand Jury and asserted his privilege under the First, Fourth, Fifth and Sixth Amendments of the United States Constitution, and specifically refused to produce the books and records that the Federal Grand Jury subpoena called for.

Now, concerning this particular hearing, the Government has prepared a memorandum in regard to a Motion To Compel The Production Of Books And Records.

Specifically what the Government is doing today is, we are going to ask Your Honor to compel the production of those books and records which are detailed in the Grand Jury subpoena served on Mr. Bellis on April 24. I have a copy of that subpoena attached to the Government's memorandum which I will present to the Court at this time.

The Court: I am trying to suggest it might be good if I saw what the subpoena is and what it is you are requesting.

(Document handed to the Court.)

As I understand it, the subpoena requests Mr. Bellis to produce all partnership records currently in your possession—which will mean his possession—for the

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partnership of Bellis, Kolsky and Wolf for the years 1968 and 1969; is that correct?

Mr. Bergstrom: Yes, sir.

The Court: And I take it that Mr. Bellis through his counsel, through advice of his counsel, will not produce these.

Mr. Lipschitz: That is correct, sir.

Mr. Bergstrom: Not only will he not produce the records but he would not indicate to us whether or not they were currently in his possession.

Mr. Lipschitz: Yes, that is correct. But, if Your Honor please, may I call Your Honor's attention to the fact that I was just handed this petition about 15 or 20 minutes ago. I don't think that the typing is even dry on it. It consists of some nine and a half pages and when Your Honor examines it Your Honor will come to the realization that a great deal of time and effort went into the preparation of this application which is being made to Your Honor.

In addition to it, if Your Honor please, there are matters which are alleged as factual matters which we claim are not correct.

I have not even had an opportunity to consult with my client to see if there are any additional factual

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matters which are not adequately stated.

I would suggest to Your Honor that we be given an opportunity first to review this application which is being made to Your Honor; secondly, we be given an opportunity to answer; third, be given an opportunity if issues of fact are raised, if Your Honor please, that a hearing be held thereon.

I don't think that Your Honor should summarily on the presentation that is made by the Government in this case make any order. I think it would be unfair to Your Honor.

I think a great deal of research has apparently gone into this legal material which the Government has presented to Your Honor. I think perhaps Your Honor should be equally informed by both sides not only ex parte, sir.

The Court: I note that the subpoena is for the production of certain partnership records of a partnership known as Bellis, Kolsby and Wolf, which I am personally aware of is a law partnership.

Mr. Lipschitz: Yes, sir.

The Court: There is no question in my mind that there is a great deal of doubt as to the extent and the situations under which a law partner may be required

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to reveal partnership records of that law partnership—not only law partnership but it applies to many other partnerships and to other unincorporated associations.

Starting back as early I believe as 1943 in United States vs. White, 322 U. S. 694, there have been a line of cases developed since that time which my very cursory examination of them would seem to indicate that factual issues may be relevant on this matter. And, of course, we have the very recent opinion in United States, I think it is entitled United States vs. Couch——

Mr. Lipschitz: Couch, that is the accountant's privilege of——

The Court: —which raises questions or at least attempts to define the extent of what privilege there may be.

I am presently on trial with a case, I expect to charge that jury this afternoon, I would see no reason why we could not at least delay anything further on this matter until 4:00 o'clock this afternoon.

Mr. Lipschitz: If Your Honor please, at 3:00 o'clock I have to be before Judge Broderick. I was required to come back to a case that I am actually on trial with but that was adjourned until tomorrow morning. I can come back this afternoon as soon as I am finished with Judge Broderick. I don't want to delay anything. At the same

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time, if Your Honor please, I suggest to you that there is no emergency concerning this.

The Court: I don't know whether there is or is not at this time. That may depend on how long the Grand Jury is going to be in session and various other matters; in any event, in a thing of this sort, I think it should be determined always without any undue delay, but affording counsel certainly an opportunity to look into the matter.

I am sure, however, that defense counsel at least has had some basis for looking into the matter since I see two eminent counsel representing Mr. Bellis in this matter, and since I have been advised by counsel that they read something in the newspapers yesterday that would have alerted them to the possible questions.

Mr. Lipschitz: May I assume that I am one of those counsel, if Your Honor please?

The Court: That is correct, sir.

Mr. Lipschitz: That is the finest thing I heard all day long.

The Court: I will request counsel to be back at 4:00 o'clock this afternoon and then we can go into the matter further. I am not indicating that I will necessarily rule on it this afternoon.

Mr. Lipschitz: Yes, sir, we will be back at 4:00 o'clock.

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Mr. Vaira: If I might add something, Your Honor, on the basis of Mr. Lipschitz's attention, I believe an evidentiary hearing would be incumbent upon him to make some sort of a showing what position he is in. I am just pointing out ahead of time that he should be forewarned if he is coming back he should be prepared to put some evidence on to sustain the factual position.

Mr. Lipschitz: If Your Honor please, I don't think we have to sustain the factual position. If Your Honor will look at the bottom of page 2 there is an allegation that Mr. Bellis' former law firm has joined in this. And, if Your Honor please, I think they must establish facts. We would like to speak to these gentlemen. We have not been informed of that.

The Court: We will have to take these matters up again a little later this afternoon.

Are there any other matters that you wish to take up with the Court at this time?

Mr. Bergstrom: No, sir.

The Court: May I ask, I have arbitrarily set 4:00 o'clock this afternoon, will Government's counsel be able to be here at that time?

Mr. Bergstrom: We certainly will be prepared to be back here at 4:00 o'clock. I don't think that there is any great urgency; it could be extended over

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until tomorrow or even Friday. But we are more than willing to be back at 4:00.

The Court: My thought was that if you will be back at 4:00 o'clock this afternoon perhaps we could at least determine what procedure may be appropriate and any time limitations that may be imposed.

Mr. Bergstrom: That is fine. We will be here, sir.

Mr. Sarner: May I say, Your Honor, in connection with the hearing, because Your Honor noted the White case and the line of cases that followed it involved large unincorporated, impersonal partnerships, and, of course, it is going to be our contention that that is not applicable to the smaller three-men law partnership in which we are concerned.

The Court: That does not surprise me that that will be your contention, sir.

Mr. Lipschitz: We would also like to have an opportunity to file a motion to quash this subpoena, if Your

Honor please. We didn't know just what the Government's approach would be, and that may be a matter for Your Honor's consideration. But I suggest we go into that at 4:00 o'clock, sir.

The Court: All right.

Mr. Bergstrom: I would appreciate it, Your

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Honor, if you would direct the Grand Jury to return to the Grand Jury room for further business.

Your Honor, the Grand Jury does not need to return here for this hearing, do they?

The Court: No, there is no necessity for the Grand Jury to be here at all, as I see it.

Members of the Grand Jury, I assume you heard what the special assistant from the Department of Justice said; they request that you return to the Grand Jury room for further consideration.

Members of the Grand Jury, you are excused at this time.

We will take a recess now until 1:30.

(This hearing recessed at 1:34 P. M. and resumed at 4:15 P. M.)

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(Resumed at 4:15 P. M.)

The Court: Gentlemen, perhaps somebody can tell me what the present situation is. Can counsel agree to any extent as to what the present situation may be?

Mr. Lipschitz: If Your Honor please, I wish to submit a motion to quash the subpoena duces tecum to Your Honor

for consideration, and also memorandum in support of the motion to quash the subpoena as well as in opposition to the request made by the Government to compel a production of the records.

I have two copies of the motion to quash the subpoena, rather an original and a copy for Your Honor, the original will go to the Clerk's file. I hand them to Your Honor.

The Court: Have copies been given to all counsel?

Mr. Lipschitz: Yes, if Your Honor please, they have them.

(Documents handed to the Court.)

The Court: The Government has filed a motion to compel production of books and records, setting forth that this subpoena had issued to Mr. Bellis and, as I understand it now, Mr. Lipschitz, you have filed a motion to quash this subpoena.

Mr. Lipschitz: Yes, sir.

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The Court: It seems to me that it will be appropriate to hear you, Mr. Lipschitz, on the motion to quash.

Mr. Lipschitz: If Your Honor please, I don't think that Your Honor can well differentiate between and separate the two applications.

The Court: I think that is true.

Mr. Lipschitz: I think they both are intertwined and they more or less I will say merge in each other.

It is our position that Mr. Bellis is an individual, that the partnership consists of the three individuals, that

the relationship between the parties was a personal one, that there is no artificial entity involved in the establishment of the partnership of Bellis, Kolsby and Wolf. That they did not operate in a fashion, in the same fashion that a large enterprise would operate, that limited partnerships would operate, or a corporation operated. They did not have the large number of employees where the personal personalities were dissipated from the picture.

The Court: Excuse me. I hope not to interrupt counsel too often but novel questions do come to one's mind on this.

Of course, there is nothing on the record as such to establish this at the present time. Do you agree with me on that?

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Mr. Lipschitz: I agree with you except that the Government even in their motion concedes that this partnership consisted of three individuals, and they did not allege in their motion, if Your Honor please, that this was a large operation in the same sense that a limited partnership would operate, or that this was some kind of an organization where individuals were participating in and that this involved a tremendous operation so that it would lose the individual personality of the parties who are concerned.

So I think Your Honor may well take judicial, perhaps judicial notice or take cognizance at least of the fact that this was a partnership consisting of three individuals, that it was a real partnership and not an association of three men.

There is a case which is referred to by the Government in their brief which relates to an association of two or more men, and there the Court found that it was not a real part-

nership. But the Government here first by the designation of the nature of the books has indicated that this is a partnership. The names indicate that this consists of three individuals. The nature of the work, the nature of the kind of work that was done by this partnership was legal. They represented clients, if Your Honor please, fees came from clients and the fees were entered, any fees that were received were entered in books. There isn't anything to the

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contrary, if Your Honor please, and I think the Government will probably concede to Your Honor the facts that I have just referred to.

We have in our motion to quash, if Your Honor please, made certain allegations. It is true that the Government hasn't had an opportunity to dispute or deny them, nor have we had an adequate opportunity to contest some of the allegations which were made by the Government, such as waiver, or a consent to the examination. But it is our position that even if the other partners did consent they could not waive any of Mr. Bellis' rights, any more than Mr. Bellis could waive any of their rights if the situation was reversed.

So it is our claim, if Your Honor please, that we were a former member of a partnership, that the records which the Government wants are personal records, private papers, that they are not held by Mr. Bellis in any representative capacity, that the organization wasn't so large that the individuals were lost in the organization because this is the theory of the philosophy on which large partnerships waive or give up their rights to claim privilege.

The Court: Do you have any case that says that?

Mr. Lipschitz: Yes, sir.

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The Court: I know that some cases talk about the size, and so on, but there are cases that specifically, as I see it, indicate that that really has nothing to do with it, and then they go on to discuss it.

Mr. Lipschitz: Yes, you have the Onassis case which is referred to at 125 Fed. 2d; you have the Lawn case, the Slutsky case—I will give them to Your Honor. You have the Cogan case which is referred to in 257 Fed. 7. There the individual who was summoned to appear before the Grand Jury was designated as custodian of the records, and he was required to produce the books and records of six partnerships.

Even there the Government's request was denied but the Government's position there was asserted to be the fact that this was a large enterprise.

There is Mal Brothers, if Your Honor please, a contracting company, and that is referred to in 444 Fed. 2d, 615, and that is a case which comes from this circuit, an opinion by Judge Ganey.

There they allowed the examination of the books because it was held that the partnership whose books and papers were sought by the Federal Grand Jury had all of the aspects of a corporate enterprise; that they employed 200, 250 people, had a payroll in excess of $1 million, and there was nothing personal or private in connection with

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the papers solicited under the subpoena duces tecum.

I think even the dissenting opinion, if Your Honor, please, in the White case, which is the case that later went up to the Supreme Court, Judge Biggs there differentiated

between a situation where you have a partnership and you have a larger group.

The Court: Of course, one of the problems that I have is that the subpoena at least to me on its face is valid, that is, it is addressed to Isadore Bellis to produce all partnership records in his possession for the partnership of Bellis, Kolsby and Wolf for the years 1968 and 1969.

On its face there is nothing to indicate that Mr. Bellis would have any proprietary interest at all in those particular records, and I think that that is one of the essential elements.

Mr. Lipschitz: If Your Honor please, where a partner is subpoenaed to produce records of the partnership he has privilege, if Your Honor please, unless it is shown that he holds those records in an impersonal fashion, we wanted to protect our position.

The Court: As I understand it, and again this will not appear of record here from the subpoena, but, as I understand it, he is not a member—well, let's put

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it this way: That there is no present partnership of Bellis, Kolsby and Wolf——

Mr. Lipschitz: That is correct.

The Court: —but there were partnership records and such a partnership in 1968 and 1969.

Mr. Lipschitz: Yes, sir.

The Court: It may well be therefore that these records rightfully belong to someone else. In other words, there is nothing to show, as I see it, that he has any proprietary interest in any——

Mr. Lipschitz: If Your Honor please, he has possession and he has, at one time he had one-third ownership of the records, he still has ownership of these records in the absence of any other proof. And I think the burden would shift to the Government that he has no ownership or possession of these records. And that isn't established any place.

The Court: My offhand view is that if there is any privilege here at all that the burden would be upon the one asserting the privilege to establish it. This may be purely a procedural aspect, it really doesn't make any great difference.

Mr. Lipschitz: If Your Honor please, the Government has made certain allegations in their application

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to you. They have asserted that the rights of Mr. Bellis to these records which were owned by the partnership had been given up by him; that because of the permission which they claim they have obtained from the other partnership, Mr. Bellis has now forfeited all of his rights to these records, if Your Honor please.

That can't be so because the other gentlemen who are members of this firm cannot give up or surrender any of the rights that Mr. Bellis has. And there isn't any doubt that he has a right to his records, assuming that these records are in his possession.

The Court: How do you square that with the partnership law of Pennsylvania, a statute, it is in 59 Purdon's Section 51, which provides that partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership and every partner shall at all times have access to and may inspect and copy any of them.

Mr. Lipschitz: If Your Honor please, that only applies to the term of the partnership. This partnership has terminated. The partnership is no longer in existence. And then there is such a thing as a waiver and abandonment of the records to another partner.

The Court: Then wouldn't we be concerned

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with who actually presently had the title to these or the ownership in them, or at least the right of posssession of these particular documents?

Mr. Lipschitz: The Government doesn't have any right of possession in them, if Your Honor please.

The Court: I am not suggesting that.

Mr. Lipschitz: The partners have. The one who has possession of them, the one who has possession of them at this time, Your Honor may assume is Mr. Bellis. You can't deprive Mr. Bellis of his right of possession. The other partners, former partners, can't take it away from him, nor may the Government by obtaining some kind of pseudo assignment of the rights of the other partners deprive Mr. Bellis of that right.

Your Honor will also see that the Couch case which substantially relies and restores the Boyd case, that is referred to at 165 U. S., also explains the situation, that you must have ownership and possession and without possession you can't have these rights, but you must have owership. And there isn't any doubt that nobody has done anything to deprive Mr. Bellis of the ownership of it.

If Your Honor will also examine a case which appears in 380 Fed. 2d, 464, that of the United States vs. Carl Cohen, there the lower court held that the taxpayer

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was entitled to invoke privilege against self-incrimination where a summons to produce his books and records was issued, because he held these records. There he had obtained work papers of the accountant, and the Court there held that he had the absolute right to retain them.

The Court: My law clerk, who has looked up a few things on this, suggests that that case may not be followed in this circuit under 443 Fed. 2d, I think it is at 513, United States vs. Egenberg.

I will be honest with you, I have not read that case yet and I am not completely familiar with it.

Mr. Lipschitz: If Your Honor please, in view of the fact that the Government has made certain allegations of the fact which we think must be established before the Government can be successful in its position, we think that a hearing ought to be held or some evidence ought to be presented by the Government to establish the assertions that they make it their request, and that one of the things which may be significant is waiver, although I doubt it very much. I don't see how anybody can waive somebody else's rights to certain privileges which are afforded them by the Constitution.

The Court: I am inclined to agree that there probably should be a hearing here to establish certain of the facts. Now, as to which side may have the responsibility

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of going forward to present such facts by testimony or evidence, I am not sure.

Mr. Lipschitz: I think Your Honor ought to start with the premise that these are personal books, that we are entitled to their possession, that the Government is not entitled to invade our rights. Now, the Government then asserts that what they rely on is a waiver of those rights, and I think the burden is on the Government to establish a waiver of rights.

The Court: If your position is correct, Mr. Lipschitz, then it would seem to me that at any time that a subpoena is issued to someone asking them to produce certain partnership records that the burden would be on the Government at that point to show that they have the right to have them produced before the Grand Jury, and I am inclined to think that that wouldn't be true unless there were something on the face of the subpoena itself that would indicate that the person subpoenaed did have an interest in the records.

The only thing on this subpoena that would indicate that is that it is addressed to Isadore Bellis and refers to a partnership of Bellis, Kolsby and Wolf.

I can't quite see why that would place the burden on the Government to establish affirmatively that these are records that are not the personal records of Mr.

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Bellis.

Mr. Lipschitz: If Your Honor please, the Government asks Mr. Bellis to produce records, let's assume which he has in his possession.

The Court: All right.

Mr. Lipschitz: Mr. Bellis claims that he is not required to produce them because they belong to him; that these

are records which are not public records, which are not in any way designated to be anything other than private records. At that point that is apparent from the subpoena, from the designation made in the subpoena.

At this point I think the Government must go forward and establish that we are wrong, that these are records which we are not entitled to possess, which we do not own.

The mere fact that these were subpoenaed doesn't establish that. There are certain rights which we claim under the Constitution of Pennsylvania, of the United States.

The Government says we have no right to claim them. If this is the case, if Your Honor please, then in every instance where a subpoena is issued to an individual and he appears in court to testify, he would have to make a complete disclosure of everything contained in those records, or everything to which he could be compelled

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to testify if he were granted immunity in order to retain his right to claim privilege. And it has been held repeatedly by the Supreme Court in the Singleton, in the Hoffman cases that a person does not have to make a complete disclosure, does not have to make a disclosure on how he is going to be hurt in order to preserve his privilege.

Now, if we have to disclose in detail why these records are personal to us and what they do contain, which would hurt us, if Your Honor please——

The Court: I am not suggesting that you would have to show what these records contain in any way.

Mr. Lipschitz: How else can we show that they are personal records, if Your Honor please?

I think the Government would show that they are impersonal records, that we have no right to retain them, that they are not being retained by us in any other way; that they are being retained by us in a representative capacity, and that we have no right to them.

The Court: Suppose we hear the Government for a minute and see what they have to say.

Thank you, Mr. Lipschitz.

Mr. Bergstrom: Your Honor, this is a different situation than might exist if we were asking Mr. Bellis to give testimonial evidence. However, we are not asking for that. We are asking him to produce certain records. He has

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asserted a privilege or a defense to the production of those records under the First, Fourth, Fifth and Sixth Amendments of the United States Constitution. At that point in time it becomes a burden on him, it becomes his burden, an affirmative defense, if you would have, to establish that he in fact has some right in those records which gives him the basis of asserting his privilege under the various constitutional amendments. That is the issue.

And I think if an evidentiary hearing is held it would be incumbent then upon Mr. Bellis to assert what interest he feels he has in those particular records be it proprietary or possessory, when he receives those records, the circumstances under which he receives them, whether he was authorized to take them, whether or not there has been a demand for them, whether or not he has complied with that demand.

The Court: What about the Fifth Amendment rights, how about your right against self-incrimination?

Mr. Bergstrom: At that particular point, Your Honor, he would not be incriminating himself to testimonial to anything. He would be establishing on the record his right to possession and/or proprietary right to the records.

The Court: Suppose a man has to say, well, yes, I have possession of them, but by disclosing that he

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thereby must inferentially disclose that he has, by so doing he incriminates himself by simply admitting the possession.

Mr. Bergstrom: Then I would suggest that he could not go forward with his burden if that were the case. That the burden is still upon him whether or not he can go forward with it or not. If he chooses not to go forward with that burden, that does not change the fact that the burden is still his.

The Court: I am just suggesting this. Suppose Mr. Bellis goes before the Grand Jury and he is asked a question:

> Do you have in your possession records of partners of Bellis, Kolsby and Wolf?

And he refuses to answer on the grounds that it might incriminate him. I don't know whether that will be the situation or not.

Mr. Bergstrom: Well, I think it probably would be.

To be quite frank with the Court, it happened this morning. That exact question was asked and that privilege was asserted.

The Court: Where a question is asked:

Do you have possession of something, and he refuses to answer on the grounds that it may incriminate

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him, under what basis can he be compelled to answer.

Mr. Bergstrom: Well, on the basis, and only on the basis that they are now alleging as a defense that they have possession of the records, and that that possession gives rise to their claim of privilege.

In other words, he is alleging that he has constitutional privileges from releasing or from producing those records, and all I am suggesting is that if an evidentiary hearing is held it is his burden to show how that possessory or proprietary interest arises, and why he has that.

The Court: Suppose by showing how it arises, suppose by showing how the possession arises, he necessarily incriminates himself? Suppose a person is brought before a Grand Jury, they are investigating a gem robbery, and say: Do you have such-and-such diamond that was stolen, and the man says—I mean, they subpoena him to produce it and he refuses, and he says, "It may incriminate me." Where are you in that situation?

Mr. Bergstrom: I don't think the situation is the same here because we are talking——

The Court: I hope that it is not.

Mr. Bergstrom: We are talking about a subpoena for certain records that are in his possession.

The Court: Suppose a person gets possession

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of them illegally?

Mr. Sarner: If Your Honor please, may I interrupt?

If you will read the question, Mr. Bellis did not admit that the books were in his possession. He took the Fifth Anendment on that particular question.

The Court: I have not yet authorized release of anything that took place before the Grand Jury so I will not take note of what occurred before the Grand Jury.

Mr. Sarner: I am sorry.

The Court: I realize that counsel made a statement but I am certainly not considering that.

Mr. Sarner: I mean counsel should be admonished that heshould be accurate at least in what he says to the Court here.

The Court: I am sure that counsel did not intend to be inaccurate in any statement.

Mr. Bergstrom: I certainly do not.

The Court: Go ahead.

Mr. Bergstrom: I have forgotten your question, sir.

The Court: It just seems to me that where a person—ofcourse, if they are claiming privilege of not turning over certain records because they say that those

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records lawfully belong to them, that is one thing. But, if on the other hand they are simply refusing to answer whether or not they have possession by reason of the Fifth Anendment and the right against self-incrimination, I think you may have an entirely different problem.

Mr. Bergstrom: Well, you may well be right. But to short-cut this particular phase of the argument, the Govern-

ment is more than willing, at least at some point in time, if the Court so desires, to produce various testimony taken before the Federal Grand Jury and ask the Court that it would lift the veil of secrecy on that testimony so that the Court could be provided with exactly what was said by various people in regard to these records. That can be done certainly at the Court's pleasure at any time.

But the Government I don't feel is bound at this particular stage to go into a full-blown evidentiary hearing when the burden would seem quite clearly to be, on the subpoena duces tecum, on Mr. Bellis to establish his right in those records and as to whether or not his claim of privilege is valid.

But over and above that, and assuming that the Court desires an evidentiary hearing, the Government is prepared immediately to ask the Court to lift the veil of secrecy on certain Grand Jury testimony and provide that

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to the Court so that the Court will have the facts before it which can determine the issue factually.

The Court: It seems to me, as I read the cases, that there can be facts that make a difference in the ultimate decision, and that being so it seems to me there should be an evidentiary hearing. I understand that the defense in effect agrees with that. I gather that the Government does not seriously dispute it. What we are really arguing about is who has the burden of proof in presenting testimony or evidence in the first instance.

Mr. Bergstrom: But there is even a larger issue here which at least arguably as far as the Government is concerned could be decided without evidentiary hearing.

The case law which is cited not only by the Government but as well by Mr. Bellis is talking in terms of partnerships

that are existing at the time of the summons or subpoena, and they are talking about witnesses who were part of those partnerships at the time of the summons and the subpoena.

We have a situation here that is totally contrary to the vast majority of the case law. We have a very simple case.

The Court: There again, this is a statement that is made by counsel and I have no doubt it is a correct statement, and I think that the defense in effect has at

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least indicated that to some extent, but really there is nothing here of record, that is by sworn testimony or anything else, that establishes that fact.

Mr. Bergstrom: Well, it would seem to me, Your Honor, that if we could agree somehow, either through stipulation or through some form of agreement, that Mr. Bellis left the partnership approximately at the time the Government alleges he left the partnership, and that in the words of Mr. Lipschitz he had a one-third interest in those books and records, certainly the case of the United States vs. Egenberg would be decisive on the issue as two-thirds interest in those records held by Mr. Kolsby and Mr. Wolf who have a superior right to those records, Mr. Bellis therefore cannot claim the privilege.

I think it boils down to a very simple issue, if we can agree upon the fact that when he left and the fact that he did leave, then his interest was one-third interest, at least at that time, we would even dispute although it seems that it would not be necessary to dispute, but the Government would even dispute at this point in time whether or not he even has a one-third interest, but if that is the defense's position, if that is Mr. Lipschitz's position, that he has a one-third interest, certainly the case can be readily decided

upon fact that Mr. Kolsby and Mr. Wolf had the remaining two-thirds interest, therefore,

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their possessory and proprietary rights——

The Court: If that fact can be established.

Mr. Bergstrom: As I understand Mr. Lipschitz's argument a few moments ago he conceded that.

The Court: I don't know that he did. As I say, I have no doubt that these are probably correct facts but it does seem to me that where a person is claiming Fifth Amendment rights that it might be incumbent upon the Government to establish that those rights do not exist or are in some way waived—I won't say don't exist, obviously they always exist.

Mr. Vaira: Your Honor, would I be out of order if I made a remark at this time?

The Court: No, Mr. Vaira.

Mr. Vaira: In a subpoena duces tecum, when a person receives a subpoena duces tecum and comes into the Grand Jury he cannot stand mute; he must say either I have them or I do not. He just can't sit there and say, I have taken the Fifth Amendment. Once he says that, then he may take the Fifth Amendment as to where they are or why he won't produce them. But the whole system of Grand Jury subpoenas would break down if someone who is served with a Grand Jury subpoena duces tecum said nothing. He has to say, I do have them or I don't have them.

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The Court: You may be perfectly right about that, Mr. Vaira. I would appreciate any cases that you may have on that point.

Mr. Vaira: Yes, sir.

Mr. Bergstrom: Your Honor, the Government is prepared to do this. We are prepared to accept for the sake of the record, we are prepared to accept the burden and we are prepared to ask the Court to break the secrecy on Grand Jury testimony, and if the Court orders that secrecy broken we will provide to the Court the testimony of two witnesses who appeared before the Federal Grand Jury specifically relating to the factual circumstances surrounding these books and records. And I think if that secrecy is broken and that testimony is brought to the Court's attention, that will satisfy, more than satisfy, certainly the Government's burden in this regard.

Mr. Lipschitz: I don't think it would be necessary to break the secrecy. I think what they ought to do is produce the witnesses and expose them to cross-examination. I don't think it ought to be an ex parte proceeding before Your Honor in the same fashion that it was before the Grand Jury.

The Court: I haven't the faintest idea what testimony that would be before the Grand Jury, but it does

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seem to me that if the question is whether Mr. Bellis had a one-third interest and Mr. Kolsby and Mr. Wolf jointly had a two-thirds interest, that this is the type of thing that could be established factually without a great deal of testimony. And I am wondering whether at least that fact could not be established by the Government without a great deal of difficulty by open court testimony rather than by breaking the secrecy of the Grand Jury, which I am most reluctant to do except where it is absolutely essential.

Mr. Bergstrom: Your Honor, as I see it, in order for Mr. Bellis to assert privilege that he asserted, I have to go back again to state that the burden is upon him to establish the proprietary or possessory right in that. That could be done very simply by Mr. Bellis stating what his right is.

Now, assuming that Mr. Bellis was still a member of that law partnership, certainly a statement to that regard would satisfy that requirement, but anything short of that will not establish it.

The Court: As I understand it, defense counsel is saying in effect simply to testify concerning that in and of itself might be in violation, might require him to testify to incriminate himself or to testify against himself. And it seems to me that it is conceivable that it might.

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Mr. Bergstrom: It is conceivable that it might but, on the other hand, it seems to be his burden and if he chooses not to meet that burden because of that fact, then that is his situation.

It happens every day, Your Honor, in courtrooms, in Grand Juries across the country.

He has the right to assert that privilege, certainly, he has the right to establish his burden in those records, but if he chooses not to do so because he feels it may incriminate him, then he cannot meet the burden and, therefore, the subpoena should be enforced.

Mr. Lipschitz: Counsel says it would be chilling the right of the defendant to claim his privilege if he has to disclose facts on which he claims that privilege. As Your Honor so aptly pointed out, if this was a jury and I was asked do I have it or I don't have it, that disclosure enough

would be sufficient to convict me and I can't be required to make that disclosure in order to claim my privilege.

Now, the admission that it may is adequate, if Your Honor please, under the Singleton and Hoffman cases.

Mr. Bergstrom: Your Honor, officers of corporations are subpoenaed day in and day out to produce records. Now, they produce those records, no testimony is taken from them, but they produce the records and they

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indicate that they are the officers of these corporations and the records are then produced.

The same type of situation exists here. They either produce them or they do not produce them. If they do not produce them, the burden is upon them to explain why they have not produced them because, for example, we are not a corporation, or because the material within those records may incriminate us. But he still has to do that. That has to be done by the individual subpoenaed whether he be an officer of the corporation, an officer of a partnership or Mr. Bellis.

The Court: Suppose you subpoena somebody, just an individual, and ask him to produce records of a corporation and he comes before the Grand Jury and he says—you ask him: Do you have in your possession these records, and he refuses to answer on the grounds it may incriminate him because he may have stolen the records.

How do you get around that situation?

Ordinarily you are subpoening the officer who is supposed to have possession of them so it would be clear that he would have legal possession of them. And you don't run into that problem. I am not suggesting there is that problem in this case. But it seems to me it is entirely

conceivable that if Mr. Bellis is claiming a Fifth Amendment right, which he has asserted here in the motion to

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quash, that this might be applicable.

Mr. Bergstrom: Of course, the Government's position is that under the circumstances such as these the Fifth Amendment privilege is not applicable, just as it is not applicable to an officer of a corporation regardless of how he may have gotten the records, whether he stole them or he found them, or whether he took them lawfully. The fact is the Fifth Amendment privilege does not apply to a situation like that, he cannot claim it. And the Government would assert the Fifth Amendment privilege does not apply in this particular case as well.

So, therefore, what we are saying is he has taken the privilege wrongfully and it is his burden to show why he is taking the privilege rightfully.

Mr. Lipschitz: If Your Honor please, there is a complete difference between subpoening somebody to produce records of a corporation and an individual to produce what are his own records or what may be his own records. In the case of a corporation the records never belonged to the officer, they never belonged to the person who appeared in a representative capacity, they belonged to another entity completely, and I think McCormick on Evidence, if Your Honor please, the second edition, makes that very clear on page 269, Paragraph 128, and clearly

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establishes the difference between an individual claiming the right and a corporate officer claiming the right or somebody who appears in a representative capacity.

The Court: May I ask the Government so far as the Grand Jury itself is concerned, I take it that it will remain in session for some period of time?

Mr. Bergstrom: I think the answer to that is yes, sir, for at least another two months.

The Court: I gather that it is urgent however that this matter be disposed of promptly in order that the Grand Jury may continue with whatever it may be investigating?

Mr. Bergstrom: Yes, sir.

The Court: I would suggest that we set tomorrow morning for the purpose of either side presenting whatever evidence either side feels appropriate or proper for them to present. If the Government wishes to rely on the fact that the defendant had the—when I say the defendant, the person subpoenaed has the burden of proof of establishing his privilege, the Government may rely on that, and if the defendant wishes to rely on the fact that the Government has the burden of proof, the defendant may rely on that and then I will have to decide.

But I do think that it would be helpful in rendering any decision that we have those facts about which there probably is really no serious doubt or dispute, and

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it would be appreciated if, without the Government agreeing that it has the burden of proof, it would certainly be appreciated if the Government would present such evidence as would establish certain of the facts that have been alluded to here this afternoon.

Mr. Bergstrom: Yes, sir.

The Court: Which might be a way around this dilemma. Because, as I say, I am not sure which one will have the burden of proof of going forward with the evidence. It does always seem to me somehow that where a person claims a constitutional privilege which on its face is certainly not a privilege claimed, that to some extent it should be up to the Government, it seems to me, to show that that constitutional privilege is not applicable in this situation. And if that may depend upon factual circumstances, and I do believe that, as I read the cases at least they all discuss these various factual aspects, it seems to me that perhaps the Government should go forward with the evidence.

Mr. Bergstrom: We are prepared to do that, Your Honor. I will have the necessary Grand Jury testimony available and would ask the Court to break the seal on that testimony.

Mr. Lipschitz: May I ask Your Honor——

The Court: Just on that regard, and again I am not ruling on that, on any such application, but I

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think it might be preferable if it can be done, to have the actual witnesses testify in open court on that aspect of it, which I gather will be simply a question of who has the possessory right to these particular partnership rights.

Mr. Lipschitz: If Your Honor please, we don't want to delay this matter, we would like to have it disposed of, but I am actually engaged in the trial of a case before Judge Smith which started last week, and we have a jury in the box and evidence is going to be submitted tomorrow and the case will probably last anywheres from a week to ten days. But if Your Honor would set some afternoon for this mater,

preferably next Tuesday, when we have Election Day and too many people will not be engaged——

The Court: I don't want to continue it that long, Mr. Lipschitz. I realize the problem that you may have, on the other hand, there is eminent co-counsel here, Mr. Sarner.

Mr. Lipschitz: By coincidence he is also engaged tomorrow, I am informed.

Mr. Sarner: Tomorrow morning, Your Honor, I was asked to speak before my daughter's high school class on a search and seizure subject, so I don't know how important that it. But that is in the morning for an hour and a half. But aside from that, I would be available.

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The Court: May I speak to counsel off the record on this phase of it.

Please come up here.

(Discussion off the record.)

The Court: After conferring with counsel off the record, we will fix tomorrow afternoon at 4:00 o'clock. At that time counsel may make any further applications counsel feels appropriate or present any testimony or evidence that counsel wishes to present.

If possible, and if time allows, I would hope that perhaps certain facts might be stipulated to; but by suggesting that I am not suggesting that defense counsel should in any way stipulate to any facts if counsel feels that that prejudices the defense's position in this case.

We will take a recess of this case until 4:00 o'clock tomorrow afternoon.

(Adjourned at 5:10 P. M.)

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Miscellaneous.
No. 73-95.

IN RE:

GRAND JURY INVESTIGATION
ISADORE H. BELLIS, A WITNESS

Philadelphia, Pa., May 10, 1973.

Before HON. DONALD W. VAN ARTSDALEN, *J.*

APPEARANCES:

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(Commenced at 4:00 o'clock P. M.)

The Court: Good-afternoon, gentlemen.

Mr. Sarner: Your Honor, before we proceed with the testimony I would like permission to give a brief summary of what our position is——

The Court: That will be fine, and I think it might be helpful, Mr. Sarner.

Mr. Sarner: —with the books and records, because there is sometimes a lot of confusion in this particular area.

Your Honor, first you have to distinguish in connection with these cases because the bulk of them you will notice involve tax investigations between those matters which support material to be disclosed in a tax return and those which are considered to be purely private personal matters.

It is undenied that the books and records of an individual taxpayer are subject to the protection of the privilege against self-incrimination contained in the Fifth Amendment, and he himself, so long as he has possession of them, the Government has never in recent years attempted to obtain them from the taxpayer.

Your Honor may recall the so-called discarded

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requirements documents rule in the famous Shapiro case, which is an OPA case, where the Government successfully argued in the Supreme Court of the United States that records required to be kept by the Emergency Price Control Act were required by law and therefore were not within the protection of the privilege against self-incrimination.

The Government thereafter in a number of cases, particularly the Falsone case in one of the courts of appeals, argued that that rule would apply in an ordinary tax investigation, that the records which all of us as taxpayers have to maintain are required by law by the Code to be kept, and therefore, were not covered by the privilege.

Interestingly enough, some courts adopted that. The Third Circuit in an earlier case cast some doubt as to whether that was the rule. But, in any event, it is now well accepted since 1969, the Stuard case, which is cited in the little memorandum I supplied to you, Your Honor—it is spelled wrong, it is S-t-u-a-r-d, it is spelled S-t-e-u-a-r-d, it is misspelled in the brief—the Stuard case has the concession by the Government and so the Government admitted that the Department of Justice has not in recent years, and they have not argued, that books and records required to be kept for Internal Revenue purposes are required by law as such within that Shapiro doctrine.

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So that we do start out with the proposition that ordinarily what is typically in books and records, and maintained in connection with the going business used for the purpose of preparation of tax return material and the like is protected.

Then you have a series of cases illustrated by the Couch, illustrated by the Egenberg case in the Third Circuit, by the Cohen case in the Eighth Circuit where the taxpayer doesn't prepare his own return but he supplies the information, he provides his books and records to the accountant or even to an attorney in the role of an accountant, to prepare the return.

Now, here you run into a difficult problem because the cases have suggested that if the material is supplied to

support what will appear in the tax return, the material which is to support the tax return is not given in any confidence. So that the attorney-client privilege doesn't protect that from going out, there is no accountant-client privilege in this particular area, and hence although normally materials and books and records are free from scrutiny, if they are actually put out of the possession of the taxpayer himself, if they are put out of the possession of the taxpayer for purposes of disclosure, and it is a disclosure if it is to support what is in the tax return,

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then it is not covered by any privilege. It is not covered by the privilege against self-incrimination because the taxpayer has turned it over to his accountant or his attorney and therefore is not in possession of it, and it is not covered by any privilege covering disclosures made in confidence because none exists with an accountant, and the attorney who takes it doesn't take it in confidence, it is to support the return.

Now, to amplify and to show the relevancy of that doctrine so far to our case, the books and records are for purposes of this proceeding now under the Government's view in the possession of Mr. Bellis, so they have not been in any way transferred, in possession, to a third person.

Our testimony will show, the evidence will show that the books and records may, as shown in the initial memorandum that we submitted, contain many things which are of a personal testimonial declaratory statement nature, covered clearly by the privilege against self-incrimination.

For example, they could very well show some expenditures as any books which the Government may claim are not properly deductible; they could show receipts which

the Government may claim were not reported; they could show a lack of an entry, and that is a record, as Your Honor knows, under the modern tendency if normally. If an event occurred and there would be a record of that, the fact that there is

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no record in the books indicates that it didn't occur. So it could very well be an absence of an entry which would lead the Government to believe that possibly this receipt has not been say reported in a proper tax return. It could show dealings with particular individuals under circumstances with which the Government may claim involve some taint of illegality or so.

So we do have in these books and records the personal aspect, which may or may not be in any way, had no way been used by the moveant here, by Mr. Bellis, to support anything in a tax return; they haven't been submitted to an accountant, they haven't been submitted to an attorney to prepare his return and, therefore, have lost that aspect of the privilege.

Secondly, Your Honor, I don't think there is any doubt, and I don't mean to be presumptious, I had the idea from Your Honor's comments yesterday that there is no doubt even in Your Honor's mind that ordinarily books and records of a small partnership as such are covered as opposed to the books and records of a large unincorporated labor-union association, or the types of tremendous limited partnerships or types of brokerage houses with which we are familiar where you have 50, 60 partners and 200 employees, and several million dollars of receipts.

The Court: I am not sure that is a correct

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statement of my views. I did indicate yesterday, and I think it is true, that at least the cases seem to indicate that there may be a distinction between partnerships and other types of business associations; and certainly some of the cases at least discuss their decisions the size of the particular partnerships.

Mr. Sarner: Yes. Well, Your Honor, you will note we referred to the Cogan, the Slutsky case, I have the Lawn case referred to in the memorandum, I have a case in re subpoena duces tecum, which was not cited in the brief——

The Court: Where is that from, Maryland?

Mr. Sarner: Federal Supplement—which deals with a small partnership.

I would think, Your Honor, that our proceeding on the basis that what I say we believe is correct, and hope to convince Your Honor that it also is correct, the testimony will show that this firm of Bellis, Kolsby and Wolf consists of three partners, at most it had one professional full-time employee and part-time professional employee and three secretaries and, therefore, it may be a total at the most of four or five employees and three partners, some seven or eight people associated with it in these years. So it is in my mind clearly the type of

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organization having the individual, personal nature which distinguishes it from the famous White case on the CIO labor-union, and the Mal Brothers, and the Silverstein cases, Onassis, cited by the Government.

Now, they do cite the Quick case which doesn't indicate whether it is a large partnership or not. But in the

Quick case this went off on the failure of the proof to show what the books and records were. You see, that is why I emphasized initially if the books and records are merely to support what is in the tax return, and that is the inquiry, I mean it is what is in this tax return supportable as such, and it was distributed and transmitted to a third person for purpose of preparing the return, it is not covered. We agree the Cooke case indicates that, and all that the Court in the Quick case says is that no showing was made by petitioner that this contained any personal testimony material.

The Court: It is possible that that might become an issue, although the subpoena that was issued requires all partnership records to be turned over and, therefore, I take it that we are not concerned with the nature of the content of the records.

Mr. Sarner: That's right.
Now, Your Honor, rightfully so, this is an

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important point, concerned itself with the rights of the partners vis-a-vis on dissolution, and I, in the short time that was available, tried to research this point.

I think it is clear, Your Honor, that during the progress of the partnership, under the Uniform Partnership Act, the partners have an interest in partnership, some co-tendency in partnership, which is similar to other joint ownership, common ownership, jointly and severally in the entire property; no one owns any particular record but they have this either one-third you might say interest, indivisible interest therein.

Now, it is curious to note that at best all the cases suggest that the dissolution would give greater individual rights, not lesser rights.

The Curcio case in the Supreme Court of the United States, which we refer to in the brief, discusses the situation where the individual shareholders argue that when the corporation was liquidated and dissolved, and the books came to them as transferees, they took on greater rights than they had when the corporation remained in existence. It was never suggested that when the corporation liquidated and dissolved there would be less rights, they argued that there were greater rights.

Now, the Supreme Court of the United States said no, the liquidation of the corporation doesn't add

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to the rights of the shareholders.

Now, the Government——

The Court: Excuse me. There is a Supreme Court case, is there not, that says that even though there was just one stockholder and if there was a dissolution it was still subject to being——

Mr. Sarner: Yes, that is one of the reasons why a lot of tax practitioners won't have their clients adopt subchapter "S" or form a professional corporation because the one stockholder, I mean if he is worried about his income tax criminal responsibility, he'd lose his privilege against self-incrimination on it. That is true. If you adopt the corporate form, then you are bound by the limitations as well as by benefits.

But the Government here, as we read the Government's position, is that the dissolution of the partnership detracts

from the rights. No one ever suggested that it adds or detracts. I mean it continues the same.

And, actually, I found one case in the Court of Appeals of New York, it is a 1931 case, when Justice Cardoza was still on the Bench, Sanderson vs. Cooke, Your Honor, which deals with the dissolution of a partnership, and there is some appropriate language, you

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know, not absolutely pertinent or so, but it does indicate that on the dissolution of a partnership the books remain, I mean, in common ownership, and, therefore, neither partner has any individual rights in them against the other.

Now, our view here is that clearly the partner will assume for purposes of the Government's position that Mr. Bellis, the former partner, is in possession of the books. He is in possession not as an agent, he is in possession as a co-owner. And this, of course, distinguishes the thrust of the Government's argument that the Egenberg case or that the Cohen case, which suggested is distinguishable or doesn't bear too much weight in this circuit, would be applicable.

In all of those cases, Your Honor, you have there the accountant, some third person, who has mere possession as an agent of goods belonging to another.

Obviously, under any view the partnership books in the hands of Kolsby, in the hands of Wolf, in the hands of Bellis, are equally owned by one of the owners; he is not in possession as an agent for anyone else as such, and, therefore, he has both ownership and possession, which was the crux of the rationale of the Supreme Court in the Couch case.

In Couch they say admittedly books and records

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owned by a taxpayer in his own possession would be free from seizure by the Government under a subpoena; but if he delivers them to the accountant then he has given up possession, therefore, they can be seized from the accountant.

In our case, under the Government's view, we are in possession of the books, we are an equal one-third owner, or so, we have an undivided ownership interest in the books and records, we can't say that we only own this particular one and therefore having ownership and possession the rationale of Egenberg in no way applies to defeat the claim of the Fifth Amendment.

Now, Cohen does have very appropriate language, even assuming that the Court may have been wrong by saying that one in mere possession of goods belonging to another can assert the privilege.

We cite on page 4 of the memorandum, Your Honor, the reference to Wigmore and to McNaughton on evidence, where the Government cannot step into the shoes of one of the partners, vis-a-vis a partner, and say that since the partner could for partnership purposes have the right to see the books or possibly get the books, we don't know that we would admit that any partner could get the books as such, maybe they could see them, we would never say they could get them—obviously the Government is not coming in for any legitimate partnership purpose,

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and hence would it be our view that they would not be able to be subrogated, as it were, to the rights of any of the public partners.

Now, we will show, I mean the testimony will show, as I say, the nature of what the books contained, that it contained non-incriminating material, the testimony will show where the possession of the books were, the ownership, the nature of the law partnership, and I think with that in mind I trust we haven't taken up the time unnecessarily of the Court in explaining our position which we hope to develop.

The Court: I appreciate that, Mr. Sarner.

I want to ask one thing to be sure that I am completely clear on this. The claim of privilege here is by reason of the contents of the record and not by reason of the fact of the possession of the records themselves. Am I correct about that?

Mr. Sarner: Is it possible? Yes, the possible content of the records, that is right.

The Court: In other words, it has apparently been stated by Mr. Lipschitz, and I gather by you at least inferentially in your argument, that it may be assumed that Mr. Bellis had some records, and that those records he maintains he has lawful possession of. In other words, it

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is not the mere fact of the possession itself or the requirement of claiming.

Mr. Sarner: Your Honor, the Couch case—no, no, we cannot make the argument that we don't have possession, that we have the ownership.

The Court: No. What I want to be sure of is that you are not making the contention that the mere fact of possession——

Mr. Sarner: —is enough.

The Court: —the mere fact of having to admit that he has possession would in some way be self-incriminating.

Mr. Sarner: I think it would.

The Court: That is what I want to know.

Isn't it really because of the content of the books and not the fact that he has the books?

Mr. Sarner: Well, let's take it—obviously, the content of the books have to tend to incriminate him, have to be, you know, available to incriminate him.

Now, let's assume that we had books that would tend to incriminate him. It could conceivably be true that after the subpoena the person in possession of the books destroyed them. That would subject him to penalty. And, therefore, when he is asked: Do you have possession of

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the books, did you have possession of them, he doesn't have to say a word.

Now, the Supreme Court has specifically said, Your Honor, in the Curcio case, he doesn't have to explain the whereabouts at all, he doesn't have to say one word, he does not have to get on the stand and say one word. And that is right I am sure in the Egenberg case.

The Court: I wouldn't agree with that because it does have to specifically claim the privilege to the question.

Mr. Sarner: Here, in Wilson vs. U. S.—this is cited in Egenberg, I am reading, it says, citing from Wilson vs. U. S.:

> Where an officer of a corporation had possession of corporate records which discloses crime there is no

ground upon which it can be said he would be forced to produce them if the entries are made by another but may withhold them if the entries are made by himself.

So he has to produce them.

Now, they may decline to utter on the witness stand a single incriminating word, they may demand that any accusation against them individually be established without aid of their

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oral testimony or their compulsory production by them of their private papers.

I would take the view, Your Honor, that if where asked: Do you have possession of the books, I don't think he could just remain silent, I think he would have to say: "I refuse to testify on the ground that this tends to incriminate me." And I have indicated why that possibly could. I am not in any way suggesting that is the facts in this case. I want that perfectly clear.

The Court: Of course not.

Mr. Sarner: But there is no doubt in my mind that if a witness served with a subpoena has intentionally destroyed the books or has done something to them, he clearly doesn't have to disclose their whereabouts. And we have the Curcio case——

The Court: Let's assume that he doesn't have to disclose their whereabouts, but suppose instead of asking him a question for which he must give some testimonial answer they say: Deliver to us the books that you have in your possession.

Mr. Sarner: And then he refuses.

The Court: Right.

Mr. Sarner: Now, the Government has one thing to do. They can proceed against him in a proceeding,

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and they must establish at the time that the subpoena was issued he had the books, independently. He doesn't have to say one word.

The Curcio case points out: They, the custodians, may decline to utter upon the witness stand a single incriminating word.

The Court: In view of that, it seems to me that it does become important to know what if anything occurred before the Grand Jury so far as Mr. Bellis is concerned as to whether he did claim privilege or not.

Mr. Sarner: I think that is so, Your Honor. I think on that preliminary point you are perfectly right.

Let me just say on page 122 of the Curcio case, 354 U. S., it says: Returning therefore to the remaining issue whether petitioner's personal privilege against self-incrimination attaches to questions relating to the whereabouts of union books and records which he did not produce pursuant to the subpoena.

They asked him where they were and he refused to testify. And they sustained that because that would tend to incriminate him.

The Court: I would like to ask Government's counsel, in view of the last colloquy that took place here, whether Government's counsel wishes to make any motions or

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applications so far as revealing the Grand Jury proceedings that may have taken place in the event that Mr. Bellis was called to testify before the Grand Jury. I know not whether he was or was not called.

Mr. Bergstrom: Are you asking me, sir, to reveal what Mr. Bellis said in the Grand Jury?

The Court: I am asking you whether you are going to make any application for the breaking of the secrecy of the Grand Jury for that purpose.

Mr. Bergstrom: Yes, sir, I will make that motion, and the Government so makes that motion under 6(e) to break the secrecy to reveal to the Court what took place before the Grand Jury when Mr. Bellis was subpoenaed.

The Court: It seems to me that before we can come to any determination on the Government's motion to compel the delivery or to compel the delivery of the books and records, that it would be necessary to ascertain what if anything the Grand Jury did to secure these books and records and, therefore, under Rule 6(e) I will direct that the secrecy of the Grand Jury be broken for the limited purpose of showing what may have transpired in the event that Mr. Bellis was called before the Grand Jury.

In that regard, I don't know how you propose to show that, whether you have the secretary or stenographer

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who took down any notes, or——

Mr. Bergstrom: Your Honor, with permission from counsel, I can relate to the Court what took place in front of the Grand Jury.

Mr. Sarner: We have no objection.

The Court: It seems to me that this is the type of thing where counsel could relate it. If there is a factual dispute, of course, if your client disputes it in any way, it might have to be established by the secretary.

Mr. Lipschitz: We don't know, we weren't there, our client was there.

The Court: All right, Mr. Bergstrom, if you will state what happened only so far as when Mr. Bellis was called before the Grand Jury.

Mr. Bergstrom: Mr. Bellis was called before the Federal Grand Jury yesterday afternoon at approximately 1:00 P. M. He entered the Grand Jury room, he was sworn by the forelady. I asked him his name and his address, which he gave me.

I asked him specifically whether or not he was appearing before this Federal Grand Jury in response to a subpoena served upon him, Isadore Bellis, with an address of 709 Medary Avenue, Philadelphia, Pennsylvania, which directed him to appear before that Federal Grand

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Jury on the 9th day of May of 1973, at 2:00 o'clock P. M., and to bring with him all partnership records currently in his possession for the partnership of Bellis, Kolsby and Wolf for the years 1968 and 1969.

In response to that question Mr. Bellis said that he was there pursuant to that subpoena.

I then asked Mr. Bellis if he had brought those records with him and was he going to produce them in accordance with that subpoena. And Mr. Bellis advised me that on advice of his counsel that he was asserting his privileges

under the United States Constitution, and specifically the First, Fourth, Fifth and Sixth Amendments thereunder, and was refusing to produce the books and records called for in the Grand Jury subpoena.

My next question to Mr. Bellis was whether or not he had possession of those particular records that were called for in the Grand Jury subpoena, to which Mr. Bellis responded that on advice of counsel he was again asserting his privilege I believe under the Fifth Amendment of the United States Constitution as to that question.

At that particular point in time I dismissed Mr. Bellis from the Grand Jury and we proceeded to this courtroom.

The Court: Mr. Bergstrom, I don't understand

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the last question that you say you asked Mr. Bellis, asking him whether he had in his possession those records called for in the subpoena, if that was the question, because the subpoena requires that he "produce all partnership records currently in your possession."

So that obviously it could only refer to such books as he did have in his possession.

Mr. Bergstrom: Right, yes, sir. I understand that is what occurred before the Grand Jury.

Now, Your Honor, if I might——

The Court: Just a moment on that.

As I have indicated before to counsel for Mr. Bellis, if there is any factual dispute as to what took place there, perhaps counsel should consult with Mr. Bellis at this point.

(Counsel confer with Mr. Bellis.)

Mr. Lipschitz: If Your Honor please, Mr. Bergstrom states that is substantially what transpired. I don't know

whether it is customary of this Grand Jury to make a transcript of what the witness said.

The Court: Mr. Bergstrom, is there a transcript?

Mr. Bergstrom: There is not one available at

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the present time. There will be a transcript available; it is just a matter of getting it typed up.

The Court: If it is necessary then that could be——

Mr. Lipschitz: Then Your Honor may obtain the transcript.

The Court: Mr. Bergstrom, as I understand it, then in the sequence you first asked him whether he was there pursuant to the subpoena, and then asked him to produce the books that he brought pursuant to the subpoena.

Mr. Bergstrom: I asked him to produce the records if he brought them.

The Court: And what answer did he give?

Mr. Bergstrom: Well, in response specifically to my question: Will you produce those records, his response was on advice of counsel he was asserting the First, Fourth, Fifth and Sixth Amendments of the United States Constitution.

The Court: All right.

Let me say, and I am not making this as a final decision, but it is my preliminary view that the question where he was asked does he have possession of any books and records, which he refused to answer on the basis of the Fifth Amendment, it would seem to me that that is the type of testimonial evidence that is sought that a person

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would have the right to refuse to answer because conceivably whether he possessed them or not, the very fact of possession might or might not incriminate him.

But, as I understand it, there was a request in which you asked him: Will you produce those records, and that he refused to product those records as called for in the subpoena.

Now, as to that it seems to me that is not in and of itself calling for testimonial evidence, and, therefore, it is a claim of privilege; and it is my view that if there is a claim of privilege such as that, that the burden is incumbent upon the person asserting the privilege to show that he is privileged not to produce them.

I simply say that to indicate that it is my view that having shown the subpoena and having shown that Mr. Bellis has refused to produce the books as called for in the subpoena under a claim of privilege, that it becomes incumbent upon him to sustain his claim of privilege and the mere claim that it might incriminate him would not in my opinion be adequate justification in view of the nature of the subpoena which is directed to Isadore Bellis and directs that all partnership records currently in his possession for the partnership of Bellis, Kolsby and Wolf for the years 1968 and 1969 be produced.

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Mr. Lipschitz: May I point out to Your Honor that Mr. Bellis has just given me a typewritten statement which he claims he submitted to the Grand Jury orally in response to the inquiry made by Mr. Bergstrom.

He said, "I did not," when he was asked about the books, "on the grounds that under the Constitution of the

United States, particularly but not limited to the First, Fourth, Fifth and Sixth Amendments, and the constitutional laws of Pennsylvania, I cannot be compelled to be a witness against myself or give evidence against myself, and the books and records may contain private testimonial, personal statements, and information which might be considered as so doing, all of which counsel has advised me, and on which advice I rely, give me the right to refuse production of the records and books you are referring to, or answering any questions in connection with them."

I think that would change the——

The Court: Do you agree that that was given?

Mr. Bergstrom: I think that is probably what was said, but I fail to see how that sheds light on the issue at all.

The Court: Gentlemen, I have indicated to you that it is my belief that it would be incumbent upon the defendant —not the defendant but rather Mr. Bellis to sustain his claim of privilege under the circumstances.

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I will leave it up to counsel whether they wish to present any testimony.

Mr. Lipschitz: Mrs. Lipman.

HARRIET LIPMAN, having been duly sworn, was examined and testified as follows:

Mr. Shmukler: If Your Honor please, may the Court note for the record that Mrs. Lipman is accompanied by counsel, Stanford Shmukler, a member of the Bar of this Court.

The Court: Mr. Shmukler and Mrs. Lipman, if there are any questions and you wish to consult with your counsel before answering them, you may do so.

DIRECT EXAMINATION.

By Mr. Lipschitz:

Q. What is your occupation?

A. I am a secretary.

Q. By whom are you employed?

A. Cohen, Bellis & Verlin.

Q. How long have you been—are you associated with Mr. Bellis?

A. I am Mr. Bellis' personal secretary.

Q. How long have you been employed by Mr. Bellis or in any enterprise with which Mr. Bellis was associated?

A. Approximately 27 years.

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Q. Do you know when Mr. Bellis and Mr. Kolsby and Wolf became partners?

A. In 1955 or 1956.

Q. And is that the time that Mr. Bellis formed a partnership with Mr. Kolsby?

A. Yes.

Q. There was another partner there named Wolf, Edward Wolf?

A. Yes.

Q. Did he come later?

A. Yes.

Q. What were your duties during the time that the firm of Bellis, Kolsby & Wolf partnership existed?

A. I was the office manager, I was the bookkeeper, I was Mr. Bellis' secretary, I did work for Mr. Kolsby, I took

medical examinations of clients, with clients and doctors, and ran the office.

Q. What was the nature of their practice? Did they specialize in any particular field?

A. It was mostly negligence and there was some non-negligence work, too.

Q. About how many people were employed by the partnership in 1968 and 1969?

A. Five, six.

Q. Can you tell us who they were, I mean what duties they performed?

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A. I know we had another lawyer, and I know there were a couple of secretaries, and there was a young man who would go to City Hall for us.

Q. Who was the senior partner of the firm?

A. Mr. Bellis.

Q. What were your duties in connection with the books of the firm?

A. Well, under the supervision of William Blumberg, our accountant, I was to make the entries, I was to enter receipts and disbursements, write checks, and so forth.

Q. Did Mr. Bellis ever give you any instructions with reference to any entries or how to treat certain items which later appeared in the books?

A. From time to time he did.

Q. Did he supervise your work on a day-to-day basis or was it periodic?

A. It was periodic.

Q. Did the books contain personal statements of information concerning the partners, particularly Mr. Bellis?

A. Yes, they did.

Q. Were you told to record personal matters or personal accounts to charge the partners' account?

A. Yes.

Q. And what items, if you recall, may have been involved?

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A. Well, there may have been country club—is that what you mean, Mr. Lipschitz?—restaurant charges, and other things.

Q. Private transactions?

A. Yes. Private parties, yes.

Q. Expenses?

A. Yes.

Q. Did you remain with Mr. Bellis during the entire time that the firm of Bellis, Kolsby & Wolf was a partnership?

A. Yes.

Q. When was it dissolved, if you know?

A. Physically in 1970, January of 1970. By that I mean that is when we left.

Q. By physically is that when Mr. Bellis moved out?

A. The partnership was dissolved three months before that but we did not leave until the beginning of 1970, February of 1970.

Q. At that time what was the arrangement as far as you can recollect concerning the books and records of the partnership?

A. Do you mean where they were? I don't follow you.

Q. Did you have any discussion with Mr. Bellis concerning the records?

A. Yes. It was—we didn't know. I asked whether or not we should take them with us and we had such limited

space we didn't know what we were going to do so we decided to leave

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them in Mr. Bellis' room, in his cabinets, where I had always kept them, where there were files, it was like file cabinets, because it was easier to do that, just leave them there.

Q. Now, did the other members of the firm participate in that discussion?

A. I don't remember. Mr. Kolsby may have been there at the time, I can't recall.

Q. Were any records taken?

A. Yes, there were some records.

Q. And where were those records left in the old firm at the old location?

A. They were left in the old office, in Mr. Bellis' room, in his cabinets.

Q. Now, after the dissolution of Mr. Bellis did you have access and refer to records—made himself available of any of the records which are now being discussed?

A. Yes.

Q. And under what circumstances did he ask you to obtain records or bring them to him?

A. Well, there may have been some questions that arose and I would call on the telephone and ask for the information. If the information was not available, usually they couldn't find anything, I would go over to that office and I would find the information myself, get it or bring it back, or

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whatever.

Q. Did you have any problem obtaining the records?

A. No.

Q. Or did you have free access?

A. Free access.

Q. Was there ever any question raised as to whether or not you were authorized to inspect the records or remove them at Mr. Bellis' request.

A. Never.

Q. I think you indicated that you removed records periodically; is that correct?

A. From time to time, yes.

Q. When did you physically get the last installment of the records or the records which are involved in this inquiry?

A. I don't know, it was the end of February or the beginning of March. I can't give you a date.

Q. At whose instance?

A. Either yours or Mr. Bellis.

Q. Did you advise anyone that you were going to get the records or wanted to get them?

A. Well, I called, as I did in the past when I needed anything, and I told, I think I spoke to Miss Baylis, Mr. Kolsby's secretary, and then I went over and I took what I could carry.

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Q. Was there any objection of any kind raised by anyone?

A. None whatsoever.

Q. Did anyone at the old office aid you in obtaining the records?

A. Miss Baylis did, and also their bookkeeper, their present bookkeeper.

Q. Did Mr. Kolsby or Mr. Wolf know that you were taking the records?

A. Yes. As a matter of fact, Mr. Kolsby was present once—well, he had Mr. Bellis' room, he moved into Mr. Bellis' room and the records were in there, so we chatted while I got them together.

Q. What was Mr. Bellis' interest in the firm immediately before the dissolution, percentagewise?

A. 45 percent.

Q. That was in dissolution?

A. Yes.

Q. Are there remittances of money between the two of them even today?

A. Oh, yes.

The Court: Excuse me. I didn't understand that last question.

By Mr. Lipschitz:

Q. Will you explain that?

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A. Well, our office has cases and they settle cases, and the other firm gets part of it, a percentage of the money, and then when they settle cases in that office we get—well, our new office gets a percentage of the money.

Q. And were these older cases, I mean some of them even preceded 1969 and 1968?

A. Yes.

Q. In other words, cases have been settled?

A. They are still being settled.

Q. Are still being settled. That is files that were subsequently retained by Mr. Bellis taken by Mr. Bellis and others that were retained by Kolsby and Wolf?

A. Right.

Q. And as settlements were made for the matter that was disposed of, there was an exchange in the funds?

A. Right, that is exactly right.

Q. Where were your offices located?

A. Where were they located? 1420 Walnut Street.

Q. And what did they consist of physically?

A. Physically, you mean how many——

Q. How many rooms?

A. Mr. Bellis' room, Mr. Kolsby's room, my room, Mr. Chillemi's, Mr. Wolf's, the file room—how many rooms——

Q. Would the stationery reveal the fact it was a firm

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name?

A. Oh, yes. Bellis, Kolsby & Wolf, yes.

Q. And to your knowledge were there partnership returns filed?

A. Yes.

Mr. Lipschitz: No other questions, sir.

Cross-Examination.

By Mr. Bergstrom:

Q. Mrs. Lipman, I am not clear on exactly how many people were in the firm during 1968 and 1969; Mr. Bellis, Mr. Kolsby, Mr. Wolf?

A. Yes.

Q. How many other lawyers by name were there?

A. Mr. Chillemi—I think of the rooms. I don't think there were any more lawyers. I can't remember, I don't think there were any more attorneys.

Mr. Lipschitz: May I ask counsel what he means, in the firm, was it on the premises, physical facilities?

The Court: I think that is proper, that we should find out whether you are speaking of partners or associates or just employees.

By Mr. Bergstrom:

Q. That is what I am trying to arrive at.

A. Employees were Mr. Chillemi, who was an attorney; I

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think there were three secretaries, perhaps four, and a young man who did our City Hall work.

Q. Now, were they part of the law firm, those other two gentlemen, Chillemi and the young man?

A. Yes.

Q. They were part of the firm?

Mr. Lipschitz: You mean by part——

Mr. Bergstrom: Wait a minute. The witness can answer the question.

The Court: Just a moment, Mr. Bergstrom and Mr. Lipschitz. I think although this young lady is a legal secretary, and apparently has a lot of experience, the question of whether a person is a member of the firm may have different context to different people and what we really want to know is whether they were members of the firm or associates or employees.

Mr. Bergstrom: And I agree. I think if the witness doesn't know she can so state, if she does know, fine.

The Witness: As far as I am concerned, he was an employee.

By Mr. Bergstrom:

Q. He was an employee?

A. Yes.

Q. So you don't know whether or not he was an official,

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a member of the firm, so to speak, a partner in the firm?

A. He was not a partner.

Q. He was not a partner?

A. No.

Q. Mr. Chillemi was not a partner?

A. No.

Q. And the young man who did the work was also not a partner?

A. No.

Q. But he worked with the firm?

A. Yes; he was an employee.

Q. He was an employee?

A. Yes.

Q. Were there any other people like Mr. Chillemi and like this young man who did city work?

A. There was nobody else who did City Hall work. And I cannot remember another lawyer. Maybe there was, I can't——

Mr. Shmukler: Your Honor, may I consult with Mrs. Lipman for just a moment?

The Court: Yes, you may.

(Mr. Shmukler conferred with the witness.)

The Witness: May I say something, please?

The Court: If it is responsive to the question asked.

The Witness: There were lawyers in our

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office who rented space from us but they had nothing to do with us.

By Mr. Bergstrom:

Q. I understand that.

Now, concerning the books and records that you kept. Who had access to those books and records?

A. The partners.

Q. So all of the partners, and by that I mean Mr. Bellis, Mr. Kolsby and Mr. Wolf had access to the records?

A. Yes.

Q. And did anyone else have access to the records besides yourself?

A. No.

Q. Did Mr. Blumberg?

A. Oh, yes.

Q. Mr. Blumberg had access?

A. Yes.

Q. So there was Mr. Bellis, Mr. Kolsby, yourself and Mr. Blumberg. Any other person who had access to those records?

A. Well, those in Mr. Blumberg's office, that is all that I know of.

Q. So that people working in Mr. Blumberg's office would also have access?

A. Yes.

Q. Now, Mr. Blumberg was the accountant at that time; is

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that correct?

A. Yes.

Q. How were these records kept?

A. I had a cash receipts book and a cash disbursements book.

Q. What else did you have?

A. I had cards for each case, each and every case in the office.

Q. Now, at any time, as I understand it, any member of that partnership, as well as yourself and Mr. Blumberg, could look into those records briefly; is that correct?

A. Yes.

Q. Now, you indicated that there were personal items in the records. What kind of personal items were there?

A. Oh, Boy! Country club.

Q. When you say country club, what do you mean, country club?

A. Well, bills from country clubs.

Q. Bills from——

A. Bills that were paid.

Q. What type of bills would these be, what would they represent?

A. Charges made at the club.

Q. And who would have charged it?

A. Those people who belonged to, those partners who belonged to country clubs.

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Q. So Mr. Bellis made charges to the country club and they would send him a bill?

A. Pardon me?

Q. Mr. Bellis would charge something at the country club and the country club would then send the law firm a bill; is that what you are saying?

A. Well, no, not the law firm. Mr. Bellis would receive the bill at the office and it was charged—I would pay the bill and it was charged against Mr. Bellis' draw account.

Q. Would the same thing occur with Mr. Kolsby and Mr. Wolf?

A. Yes, that is exactly right.

Q. How were those bills paid, what type of check was drawn?

A. A check out of my regular account.

Q. Which is, the regular account is under what name?

A. Bellis, Kolsby & Wolf.

Q. Bellis, Kolsby & Wolf. So you were paying these bills with partnership checks?

A. Right.

Q. You weren't paying them with the personal check of Mr. Bellis?

A. No.

Q. Now, other than country club, what other type of personal, as you categorize personal items, were there?

A. Restaurant charges.

Q. Do you know——

A. I haven't done this for three years. I have to remember.

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I don't know.

They are the ones that stand out.

Q. Restaurants?

A. There was a Bar Mitzvah and I remember that that was also paid out of the office.

Q. By that you mean it was——

A. And charged against the partner.

Q. It was paid for by the partnership check?

A. Yes, that's right. There were many items, I just can't remember.

Q. But now when you talk about these personal items specifically concerning the country club bills and the luncheon bills, you don't know——

A. Restaurants.

Q. —or restaurant bills, I am sorry, you don't know what transpired at those particular meetings, do you, in the restaurant or at the country club? In other words, it could have been a business luncheon?

A. Yes.

Q. It could have been a business day at the country club; is that correct?

A. That's right.

Q. So it may very well not have been a personal expense, it could have been, very well have been business?

A. No, it was broken down usually. I would be told so

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much of this is personal, so much of this is business.

Q. So some of it was categorized as business and some of it was categorized as personal?

A. Yes.

Q. Now, did the accountant have access to all these records?

A. Yes.

Q. Do you know why he had access to all those records?

A. He just had. I was told to give them to him.

Q. Was there any reason why you were told to give them to him?

A. No. Because he was the accountant.

Q. Do you know who prepared the tax returns?

A. He did.

Q. So was it fair to say that he was given those records to prepare tax returns?

A. Yes.

Q. Did Mr. Blumberg prepare the partnership tax return?

A. Yes, he did.

Q. Now, you indicated that sometime in September the partnership was dissolved.

A. I don't know, I didn't indicate September. I said a few months before.

Q. All right, a few months before, January 1, 1970. And then you moved out on January 1 of 1970.

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A. February.

Q. February.

Now, when you went back to—you indicate that you had access to the records, you had access to the records since that time?

A. Yes.

Q. What records have you actually taken and kept since that time other than the ones you took?

A. I am sorry, I can't answer you. I don't know, I don't remember.

Q. You don't know?

A. No.

Q. Do you know whether or not you have actually taken records between February, 1970 and up to the point where you indicated you went over and got all of the records, during that period of time?

A. Say that again?

Q. From February of 1970——

A. February of 1970, yes.

Q. From the time you left up until about two months ago, when you went over at Mr. Bellis' request to get all the records——

A. Yes.

Q. During that period of time, that approximate three-year period, do you specifically recall taking records from

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Bellis and Kolsby, from that office, and keeping them?

A. Yes, I do.

Q. You do?

A. I think, yes.

Q. No question about it?

A. Yes, there is no question about it.

Q. And keeping those records?

A. Are you talking about files?

Q. I am talking about the records that you have described.

A. Yes.

Q. And not returning them?

A. No.

Q. You just kept them?

A. Yes.

Q. Do you specifically recall what records that might have been?

Mr. Lipschitz: She has answered that question. She already said she doesn't recollect.

The Court: I sustain the objection.

By Mr. Bergstrom:

Q. Now, on other occasions you indicated that you would telephone to the partnership and ask them to check certain things for you in the records; is that correct? Did you do that often?

A. Sometimes it was often and sometimes it wasn't. In the

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beginning it was often, yes, but then as time went by I still did it from time to time.

Q. Now, you indicated that you had the permission of Miss Baylis to take the records.

A. Baylis.

Q. A few months ago?

A. Yes.

Q. Did you ever——

A. Excuse me. I didn't say—I said I told her I would be over, I was coming over.

Q. And what did you do?

A. And I went over and got them. But I didn't say "May I?"

I said I am coming over because I felt they were ours.

Q. Did you tell Mr. Kolsby you were considering taking the records?

A. Yes.

Q. You told him that?

A. Well, he wasn't there but then I told him after that, and he was there once when I was taking them, yes.

Q. Well, did you ever tell Mr. Kolsby that you were taking them?

A. Yes.

Q. You told him that verbally?

A. In person.

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Q. In person?

A. Yes.

Q. You told him verbally in person that you were taking these records.

Did you tell him that you were not going to bring them back?

A. He didn't ask me.

Q. He didn't ask you?

A. No.

Q. Did you tell Mr. Wolf?

A. I didn't see Mr. Wolf at all.

Q. Now, where did you take the records when you left with them?

A. I took them back to our office.

Q. And who did you give them to?

A. Well, I put them in Mr. Bellis' office.

Q. Put them in his office?

A. Yes. He wasn't there.

Q. And how many trips did you have to make to get the total number of records?

A. I would say four, five. It was over a period of a week or so. There was no hurry about it.

Q. Now, you indicated that there were cases that were still being settled between the partnership of Bellis, Kolsby & Wolf?

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A. Yes.

Q. Are cases still being settled?

A. Yes.

Q. And are some of those cases that are still being settled, contained in the records that you took from Kolsby?

A. I am sorry, I don't understand that.

Q. You indicated that there are still cases pending that haven't been settled; is that correct?

A. Yes.

Q. Now, are some of those cases that are pending contained in the records that you took from Bellis and Kolsby?

A. I don't know; they may be.

Q. You don't know, they may be?

A. They may be.

Q. You have indicated that there was a cash receipts ledger; is that correct?

A. Yes.

Q. Is that where all of the cash receipts were kept?

A. Yes.

Q. Describe the book, the ledger book for us, would you?

A. The first ledger book I had—how could you describe a ledger book? It had many columns and I made an entry of where the money came from in that column, what it was, and then we got a Safeguard method whereby carbons were made.

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You would have a deposit and you would enter it on the card and it would go through, or on the sheet and it would go through to the card and that would be it.

Q. Is that the kind of accounts receivable ledger that you had in 1968 and in 1969, the second one that you described?

A. No. I really don't know. I don't know when we changed our system.

Q. You don't have any idea when you changed your system?

A. I don't know. I really don't know because I kept the other system for such a long period of time, I don't know.

Q. Did you pick up any accounts receivable ledgers when you were over there two months ago?

A. I picked up ledger, I picked up probably, yes.

Q. You don't know what you picked up?

A. I got books for those years so that probably was in there.

Q. What kind of a ledger was that? You don't know?

A. No.

Q. But you think you got the accounts receivable ledger?

A. I think so.

Q. You think you got the accounts receivable ledger but you don't know?

A. No, because I didn't check. That is exactly right.

Q. Once again, what is in those accounts receivable ledgers?

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A. Money that came in.

Q. From whom and for what?

A. From insurance companies with whom we settled cases, and sometimes from retainer clients.

Q. So you are talking about fees for services rendered?

A. Right.

Q. From the partnership?

A. From the partnership?

Q. Yes.

Mr. Lipschitz: There are no fees for services rendered from the partnership.

By Mr. Bergstrom:

Q. Services rendered by the partnership.

Do you understand my question?

A. Services rendered by the partnership?

Q. Yes. Is that what these were coming in for, ma'am?

A. Yes.

Mr. Shmukler: Your Honor, she would like to consult with me.

The Court: You may do so.

(Mr. Shmukler confers with the witness.)

The Witness: Would you clarify that for me?

By Mr. Bergstrom:

Q. You indicated that the accounts receivable ledger was made up of fees that had come in from insurance companies

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and/or retainers?

A. Right.

Q. Are you talking about fees that came in?

A. Not fees, no, we have it wrong. Cases that were settled. An insurance company would send us money for our clients and for ourselves and it wasn't just our fee.

Q. No, I understand that. But the fee was, whatever the fee was and to who it was to go to was based upon the legal representation by Bellis, Kolsby & Wolf?

A. Right.

Mr. Bergstrom: I have nothing further, Your Honor.

The Court: Any redirect?

By Mr. Lipschitz:

Q. Mr. Blumberg also made audits, did he not?

A. Yes, he did.

Mr. Lipschitz: No other questions.

The Court: Gentlemen, I think we should take a short recess. Mr. Comer has been going all day. We will take about a five-minute recess.

(Short recess at 5:15 P. M.)

The Court: I believe everyone has completed the questions they had of this witness, of Mrs. Lipman.

Any other questions of Mrs. Lipman?

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Mr. Bergstrom: I have none, sir.

Mr. Lipschitz: No other questions.

The Court: You are excused.

The Court: Do you wish to call any other witnesses at this time?

Mr. Lipschitz: No, if Your Honor please.

The Court: Do you wish to call any witnesses?

Mr. Bergstrom: No, sir, we do not wish to call any witnesses.

What I would ask the Court to do, in line with the Court's feelings yesterday, I would request that the Court permit me to make a motion to once again break the seal on certain Grand Jury testimony which would lend certain facts to this situation. Specifically I am talking about the Grand Jury testimony of Mr. Herbert Kolsby. I have that Grand Jury testimony here with me today. It is not lengthy, and I would ask the Court under Rule 6(e) to consider a motion to break that secrecy so the Court can be presented with the facts that were developed during that particular Grand Jury session.

The Court: What is your position?

Mr. Lipschitz: If Your Honor please, first, we think we ought to have a copy of that testimony. Of course,

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Your Honor——

The Court: That can't be done.

Mr. Lipschitz: I am thinking it would deprive us of our constitutional rights if Your Honor would consider testimony presented in the Grand Jury in the absence of the defendant.

We have not had any opportunity first to see it to examine it, and if Your Honor is going to rely on any phase of it, we ought to be given an opportunity to rebut it, if necessary. And I think Mr. Kolsby ought to be called because this lady also appeared before the Grand Jury, and the Government made——

The Court: Mr. Lipschitz, you need make no further argument. I agree with you. I see no reason why Mr. Kolsby, if he is to be a witness, can't be called. He apparently, as far as I know, is available and resides here in the city. He may then be subject to cross-examination.

So if the Government wishes to have him as a witness to present any testimony through him, it seems to me that he should be called as a witness.

In addition to that, as I have indicated before, I am most reluctant to allow any of the proceedings before a Grand Jury, except where there is the utmost necessity, as I think there was to get the procedure straightened out in this case, to permit that portion of the Grand Jury

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proceedings in which Mr. Bellis was called before them. So I will deny that motion.

Mr. Bergstrom: May we have a moment, sir?

The Court: Surely.

(Government counsel confer.)

Mr. Bergstrom: Your Honor, the Government sees no need at this time to call Mr. Kolsby. We are prepared to argue the case.

The Court: All right, I will hear you, sir.

Mr. Bergstrom: I think it is their motion and it is their burden so I would assume——

The Court: It is the motion of Mr. Bellis to quash the subpoena, however, it is the Government's motion, as I understand it, to compel him to produce the books and records, so there are two motions outstanding.

Mr. Bergstrom: I am prepared to argue, Your Honor.

The Court: All right, sir.

Mr. Bergstrom: Your Honor, the central issue in this particular case is whether or not the records in question have a privilege. We must distinguish between the privilege that is afforded to records and the privilege that is afforded to individuals, persons.

It is the Government's position that these

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records have no privilege and that therefore they must be produced regardless of the fact that what may be contained therein could possibly incriminate Mr. Bellis. And it is that privilege, privilege as it pertains to the records, that transcends all other

privileges that may exist here because if the Court should find that these records have no privilege, then the Court can, can compel their production regardless of the fact that certain things in them may themselves be incriminating.

Now, to arrive at whether or not the records have a privilege, we must look at a long line of cases.

The cases that have upheld the right to subpoena partnership records, and cited in the Government's brief, follow that line of cases developed from Boyd on. And the principle announced in Boyd, and the principle announced in White, and the principle announced in Wilson and the principle announced in Rogers all seems to be clear that the records must be producible, and that the records themselves have no privilege. Partnership records are treated in an identical manner as corporate records under certain circumstances.

The circumstances of this case which would dictate quite clearly that the partnership records should be treated as corporate records, or which would indicate that these partnership records have no privilege, is

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justified by two facts.

First of all, Mr. Bellis is no longer a partner in that particular law firm. His partnership has since dissolved sometime in the latter part of 1969, so he has no interest from that date on in the partnership regardless of the fact that there may have been fees still being split due to work that was generated while the partnership existed. But, however, from that

particular point on, whether it was September or whether it was November, or whether it was even January 1st of 1970, from that point in time on the business of Kolsby and Wolf continued without the partner Bellis, and he had therefore no interest in that ongoing partnership.

So from that particular point in time he was not a partner, and he is no longer a partner.

When he left that partnership, and when he left those books and records with that partnership, it is the Government's contention, although not cited in the Government's brief, but it is the Government's contention that at that point in time it would appear to me that Mr. Bellis abandoned those books and records. Certainly, he had access to them as the secretary indicated, and then she would check them periodically and go get them periodically, but for the bulk of those particular books and records it would appear that they have been abandoned and

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they were not taken until three years, some three and a half years after the dissolution of the partnership.

Now, with Mr. Bellis no longer being a partner in that partnership his holding those partnership records is in violation of a superior right which exists in the ongoing partnership of Kolsby and Wolf.

And the Third Circuit case of the United States vs. Egenberg would seem to be clear on the fact that the person, the individual or the body who has the superior proprietary or possessory interest has the superior right, and that a claim cannot be invoked by a person with an inferior right.

In addition, in determining whether or not the partnership records have a privilege in themselves, the Court must look, as the cases indicate, to whether or not the records ever had an expectation of privacy, whether in fact they are personal, whether in fact they are private records or whether they are impersonal business entries, as it seems clear the bulk of those records are.

From the testimony of Mr. Bellis' witness, Mrs. Lipman, it would seem apparently clear that a number of people had access to those records, including the accountant, and that those records were used primarily by that accountant to prepare various tax returns.

It would seem to me that at the time those

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records were made there was never any expectation of privacy in those records; they were not the personal or private records of any one individual. They were records of an on-going law partnership. And the records were maintained because the law required them to maintain records because tax returns had to be filed, both for the persons and for the partnership.

These are records that never had an expectation of privacy, and certainly the facts of the case support the fact they did not have privacy. They were accessible by three, four, five, six people, including an accountant, and the records themselves were used to prepare federal income tax returns.

So it would appear to me that on the two grounds that we have to look to to determine whether or not these records have a privilege, it would seem perfectly

clear that the records themselves have no privilege because there was never an expectation of privacy in regard to those particular records, and because Mr. Bellis himself is no longer a partner, and he does not have a superior right to those records over the existing partnership.

Because of that, because of the cases cited by the Government in their brief, and particularly the Egenberg decision, and particularly the Couch decision, we would strongly urge this Court to compel Mr. Bellis to comply

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with the provisions of the Grand Jury subpoena and turn over those books and records that were requested.

In addition, it would seem clear to me that there has been no burden met on the part of the defendant—on the part of Mr. Bellis, excuse me, the witness; he has not met his burden to show that the records themselves have a privilege. He has not been able to show that he has the superior proprietary right or the superior possessory right to those records, and he has not been able to show that those records were strictly personal, private records, maintained by him and with an expectation of privacy; and without showing that, Your Honor, he has not met his burden, and the case law I feel is clear on that.

The Court: Thank you, Mr. Bergstrom.

Mr. Lipschitz: Will Your Honor hear me?

The Court: Yes, sir.

Mr. Lipschitz: If Your Honor please, when Mr. Bergstrom speaks of the superior right to the records,

superior to whom? Is it superior to the Government or superior to the other partners? And that superior right is intertwined with his assertion that the books were abandoned.

These books were never abandoned, if Your Honor please. We never gave up our rights to the books.

Who did we give the rights up to? The other men who were in the firm?

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If Mr. Bergstrom's argument is to bear any weight, if Your Honor please, then a partner could never after dissolution of a partnership, he could never enforce his rights to look at those books because they were abandoned.

This is Mr. Bergstrom's theory of the case.

Privacy has nothing to do with this.

Do we have to put up a sign: These records are private records, in order to retain our right of privacy? Is this what Mr. Bergstrom means?

He speaks of the law required records to be kept. If Mr. Bergstrom's argument is to carry any weight, if Your Honor please, then there wouldn't be any records at all where a person could consider them to be private.

At what point the records required to be kept by law, according to Mr. Bergstrom, can they ever become private? They can't. And you can't force a man to bring in his records.

The only problem here arises from this evidence is the fact that there was a partnership, three men owned records, the man, who according to the evidence, which is undisputed at this point, who had the largest interest,

has the records, assuming that the claim is correct or Mr. Bergstrom's argument is correct.

The Court: Do you think it makes any difference whether there are three partners or three

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hundred partners?

Mr. Lipschitz: If this enterprise or this operation, if this law practice had a firm the size of Wolf, Block, Schorr & Solis-Cohen——

The Court: Three hundred I said.

Mr. Lipschitz: Three hundred—it wouldn't make a bit of difference, if Your Honor please.

The only difference that could arise if they become a professional association. That may change the effect of the partnership.

The Court: Then you are arguing in effect the partnership records could never be subpoenaed from any of the partners?

Mr. Lipschitz: Cannot be subpoenaed from the individual unless this is a tremendous enterprise, and there is nothing personal about their relationship between the partners and the records, and clearly there is.

I can't see, if Your Honor please, where you have to assume that these records are to be treated the same as corporate records. In the case of corporate records they don't belong to the individuals, they belong to an artificial entity, and the officers who appear are the agents of the entity. They don't belong to those individuals, they are stockholders, they may be stock-

holders, they may be officers, but the records belong to the corporation.

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This isn't the situation where you have a small partnership, as you have here. And there isn't any doubt that Mr. Bellis has an interest, has an interest even now in what is the dissolved partnership, and he has an interest in the records.

The Court: I don't understand the Government to contend that he has no interest in the records at all, no interest to look at them. Maybe I misconceive——

Mr. Lipschitz: If I may quote, "He is no longer a partner in that firm and therefore he has no interest in that firm."

This is what Mr. Bergstrom said.

In what capacity does he hold him? I don't think Mr. Bergstrom can contend that these are records which were stolen from the original firm. That can't be.

They are Mr. Bellis' records perhaps as much as the others. The others, there is no evidence before Your Honor that the others had even made a request for the return of those records. There is nothing before you to make even that determination or base any determination on that proposition, or on that assumption.

True, we left the books there because we just didn't take them with us. And I think the lady who testified said that they didn't have enough room to take them and as time went on we took the records.

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We say to Your Honor that even in the cases that have been decided, that are referred to by Mr. Bergstrom, they do not support that view, and there they had said, the issue is whether or not the possession is in an agency capacity or otherwise. They also said in that case dealing with a personal nature of a privilege, and we have been unable to perceive that the seizure of a man's private books and records to be used in evidence against him are substantially different from compelling him to be a witness against himself.

And this is what the Government is trying to effect in this case.

Mr. Sarner: Your Honor, may I just add one point with your permission?

The Court: You may, Mr. Sarner, of course.

Mr. Sarner: I just want to meet the Government's argument of privacy, which is completely misplaced, Your Honor. No one ever equated the privilege against self-incrimination to privacy.

If I go out and shout I committed this murder and I committed that murder to 50 people, I don't have to get on the stand and say I committed it. I can always assert my privilege.

What they are doing, Your Honor, is taking the

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privacy dealing with the attorney-client privilege, and that is why the books and records problem gets so mixed up because you always have usually two situa-

tions; you have the books and records not in the hands of the owner, that is the problem, they are always in the hands of the accountant or the attorney and then the Government comes in and says, well, these weren't private and therefore you don't have your confidentiality privilege applying.

But no one ever suggested that privacy applies to privilege against self-incrimination.

I can disclose——

The Court: But the cases do indicate, don't they, that where, for instance, as given to the tax accountant, they are thereby subpoena I believe, they do discuss the question of the privacy, that they weren't intended to remain the personal private property of the taxpayer.

Mr. Sarner: But the disclosure, we are talking about disclosure, is something submitted in confidence. The whole point is disclosure. If someone tells an attorney something in confidence that's free from disclosure.

The Court: Right, of course.

Mr. Sarner: If he gives books and records to the attorney which he wants the attorney to submit to the SEC, that is given for purposes of disclosure; it has nothing to do with self-incrimination, not a thing to do with it.

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Privacy has nothing to do with it. It's such a cardinal rule. Because I can disclose 10, 15 people that I did this, I can write in my books that I did all these things,

everybody can see them, and yet the Government cannot compel me to deliver them.

And the Boyd case, Your Honor, I mean the Boyd case, Egenbert, the famous case which Mr. Lipschitz was reading to you, says specifically that the books and records of an individual are the same as his testimony. And if you take the Government's view there would never be a situation where you had any books and records for tax purposes subject to the privilege against self-incrimination. It is just not the law. And they have made no showing whatsoever.

We have the burden. We show that we have books and records, we show that we have a small partnership, and we show that they are under the view here in the ownership and possession of Mr. Bellis, at least in his office. It was shown that much.

They haven't even come forward with any suggestions that this is not with the complete consent and authorization of the other partners. Nothing has been adduced. You must find that that is so. They waived their right to proceed.

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They didn't introduce the Grand Jury testimony. Well, they didn't introduce Mr. Kolsby who could have refuted it. He was available. And the Government can't play hot and cold that way.

The Court: Thank you, Mr. Sarner.

Gentlemen, this is a matter, as I see it, that should require prompt decision.

There has been a case decided by Judge Blair of the District of Maryland, Civil Action No. 72-292B,

decided on April 23, 1973, I believe. It has not yet been reported in Federal Supplement. It will be reported in Federal Supplement. That case involved a law partnership of four partners.

It is true that so far as I read this case, it does not indicate that it had dissolved but Judge Blair discusses at some length the question of dissolution of corporations as contained in the various cases, and in this opinion he concludes that the size of the partnership is not the crucial test.

I, without going into any detail, accept and adopt the reasoning of Judge Blair. He concedes that there are differences of opinion or splits of authority, if you will, the Southern District of New York apparently having decided some cases that would seem to indicate to the contrary, but he concludes that they are subject, law partnership

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records are subject to subpoena. And I agree with that decision.

I will therefore in substance direct that the records be turned over. However, as disclosed by the testimony, it would appear to me that perhaps the subpoena as presently worded might be overly broad.

Mr. Bergstrom: Your Honor, at this time the Government is willing to narrow the limits of that particular subpoena.

The Court: Let me suggest that in view of the testimony that was given, it seems to me that there may be certain partnership records in the possession of Mr. Bellis that include what I would refer to as individual client files, and we get into a very delicate ques-

tion of attorney-client privilege there, and I would not direct that those be turned over.

So far as the cash receipt books, cash disbursement books, or any books and records showing the financial situation of the partnership, it seems to me are records of the partnership, they are under the partnership law of Pennsylvania subject to any agreements between the partners to be kept at the principal place of the partnership and every partner shall at all times have access to and may inspect and copy any of them and, therefore, it

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seems to me, they are not the personal records of any one particular partner; and if they are found in the possession of one partner it seems to me they are subject to subpoena and investigation by a Grand Jury.

Therefore, I will make the following order: That it is directed that Isadore Bellis comply with the subpoena that was issued by the Grand Jury directing him to turn over all partnership records currently in his possession for the partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969, limited, however, that any individual client files containing any advice or confidential relationships between the attorney and attorney and client are not to be divulged, but he shall turn over any cash receipt books, cash disbursement books or books of records and accounts of the partnership for the years in question.

It seems to me that there should be given some reasonable time within which Mr. Bellis may comply with this before we would proceed with any contempt proceeding. On the other hand, I will state at this time that I will be most reluctant to issue a contempt cita-

tion which would include possibly jailing the person found to be in violation of the order or being in contempt of court, without giving an adequate opportunity to appeal this because it certainly is a matter that, as I see it, has never been clearly decided by the United States Supreme Court nor by the

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Third Circuit Court of Appeals.

Whether this order that I have just now made is presently appealable, I am not in a position to say but I want to afford full opportunity for appeal to be taken in this matter.

Mr. Sarner: Your Honor, may I address myself to this last problem because I had this in a case and Mr. Vaira is familiar and Your Honor is familiar also, the Jaskiewicz case, which is involved in another matter.

The Court: There the Government decided they would appeal.

Mr. Sarner: No. This is prior to the time that the matter was referred to Your Honor.

I tried to prevent the accountant for Mr. Jaskiewicz from testifying before the Grand Jury. Judge Van Dusen, who was then on the District Court, ordered him to testify. I argued that it was in violation of the accountant-client privilege and the Pennsylvania law, and with the tacit agreement with the United States Attorney we took the appeal to the Court of Appeals, briefed it and argued it and unfortunately the Court of Appeals decided they had no jurisdiction unless there was a contempt determination. So that it had to go back for that purpose.

I would like Your Honor to direct Mr. Bellis

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to produce the records, he refuses, and hold him in contempt and stay——

Mr. Lipschitz: Will Your Honor give me an opportunity to speak to counsel?

Mr. Vaira: There are cases in the Seventh Circuit in re Dionisio which went to the Supreme Court on the very same issue. I think there was a discussion that the contempt citation is which is appealable.

(Mr. Bellis confers with his counsel.)

Mr. Lipschitz: Would Your Honor give us a little time—I would be reluctant if I were Mr. Bellis to be held in contempt for anything—perhaps I deserve it on occasions. But what we would like to find out, and I haven't done any research on it, is whether or not there is any kind of an appealable order other than the final order which would declare Mr. Bellis as being contumacious.

I know there are certain circumstances, beginning with the DiBella case, which was decided some years ago, where the Court may certify a matter for appeal even though normally it would be considered to be interlocutory.

I think this matter which Your Honor is about to dispose of or may have disposed of has great importance. I think it will arise, I know one other instance where it arose, and the Government apparently abandoned its position,

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and this happened very recently. It may arise again.

I think it would be of interest to all concerned to

have this matter adjudicated without the harm that will ensue to a person who is trying to have a final determination made of the matter. If Your Honor would give us one or two days so that we could do a little research, and I think we have all been under pressure trying to get all of the law together for Your Honor.

The Court: I completely agree with that statement. It seems to me that perhaps at this point I could direct that the books and records which I have directed should be turned over, should be turned over no later than a given date, next week, and that will certainly afford an adequate opportunity; in other words, that I would not find him under any circumstances in contempt of court prior to that.

May I ask Government counsel how urgent the matter is so far as this Grand Jury is concerned. They will remain in session for a considerable period of time, will they not?

Mr. Bergstrom: It seems to me, Your Honor, they are only going to be sitting for another two months so if we could have the order to direct Mr. Bellis to produce the records to the Grand Jury either on next Wednesday or the following Wednesday, preferably next

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Wednesday——

The Court: Frankly, that is exactly what I had in mind because I think that would give counsel an opportunity to determine what procedurally may be done.

Mr. Lipschitz: I would perfer the week after that because it is in the interest of the Government because

Mr. Bergstrom said the other day I think that they were quite crowded and they couldn't have anything else, they were all tied up the next week, so perhaps it would be more convenient for him to make it a week from next Wednesday.

Am I quoting you correctly?

Mr. Vaira: I cancelled an hour of Grand Jury next week; it's available.

Mr. Lipschitz: I don't want to pressure you.

Mr. Bergstrom: That would be four or five days to research it. He just said he only needed a day or two.

The Court: The order which I have just made in Miscellaneous No. 71-295, directing that certain records be turned over by Mr. Bellis to the Grand Jury in response to the subpoena which it issued, I will direct that they be turned over to the Grand Jury on or before

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12:00 o'clock noon, May 16, 1973.

Mr. Bergstrom: There is one other point. Your order excepts all those records which may be in violation, which may violate the attorney-client privilege. If the Government could produce a waiver of any attorney-client privilege would Your Honor be disposed to modify that order as to that particular client? In other words, if the Government were to produce a client who waived any privilege would the Court be disposed to modify the order as it pertained to that client only?

The Court: You are asking me to give you an ex parte declaratory preliminary advisory opinion, which

I will not do. Of course, I would entertain a motion. I think that if there is a waiver, certainly, an express waiver, that might raise different issues and different questions.

I mentioned that subpoena as having been issued in Miscellaneous No. 71-295, which is the number that appears on the subpoena. I am not sure why that number would appear. Normally it should be 73-something.

Mr. Vaira: Your Honor, if it was on there, that is incorrect. I meant to go to the Clerk's office and get a new Miscellaneous number yesterday but I didn't want to do it until we got in and filed that document. I don't know what the Court would do with it.

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I think that I should go down to the Clerk and get a new Miscellaneous number for this particular proceeding here.

I think that is an incorrect number.

The Court: That is a matter for the Government to decide, how it should proceed in that matter.

Also, of course, this matter came to me as emergency judge as a special matter, but I take it that under our rules anything further that comes up on this matter would remain with me. It would seem to me appropriate that it should be.

Mr. Vaira: I will get a Miscellaneous number and communicate it to your clerks.

Mr. Lipschitz: One other request, Your Honor. Could we have a copy of that opinion? It won't get over to us for probably a month or two.

The Court: Yes. This is a matter that just came to our attention, I guess today, and we were able to or we heard about it the other day and telephoned, and we just received a copy of it today.

I will have Xerox copies made of it, I guess the machine is closed at the present time, and will deliver to counsel.

Mr. Lipschitz: We can pick them up if we get a call from your chambers.

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The Court: We will have them for you tomorrow, gentlemen.

Anything further at this time?

(No response.)

We will recess.

(Concluded at 6:00 o'clock P. M.)

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[1]

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES GRAND JURY
Wednesday, May 16, 1973

Proceedings taken before the United States Grand Jury, in the Grand Jury Room, Room 12, United States Courthouse, Philadelphia, Pennsylvania, on Wednesday, May 16, 1973, beginning at 1:10 o'clock p.m.

APPEARANCES: THOMAS BERGSTROM, ESQ.

Representing the United States
Department of Justice

TESTIMONY OF ISADORE BELLIS

The Grand Jury Foreman: You do swear that the evidence you shall give to the Grand Inquest in the matter now pending shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Isadore Bellis: I do.

ISADORE BELLIS, having been

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duly sworn, was examined and testified as follows:

EXAMINATION.

By Mr. Bergstrom:

Q. Please be seated, sir. For the record please state your name.

A. Isadore Bellis.

Q. Mr. Bellis, for the record are you the same Isadore Bellis that appeared before this Grand Jury last Wednesday, which would have been May 9 at a different location, and appearing before that Grand Jury pursuant to a subpoena of this Grand Jury issued to you directing you to appear before the Grand Jury and bring certain partnership records of the partnership of Bellis, Kolsby and Wolf for the years 1968 and 1969?

A. I am the same Mr. Bellis that appeared here on May 9 and pursuant to the subpoena.

Q. Now, subsequent to that appearance, Mr. Bellis, were you present in Courtroom Number 15 wherein Judge Van Artsdalen ordered you to provide those particular records to this Grand Jury, sir?

A. Yes.

Q. Were you present?

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A. Yes, I was.

Q. And did you hear that order?

A. Yes, I did.

Q. Now, Mr. Bellis, did you bring those records with you today, sir?

A. I did not on the grounds that under the Constitution of the United States, particularly but not limited to the First, Fourth, Fifth, Sixth, and Fourteenth amendments, and the Constitution and laws of Pennsylvania, I can not be compelled to be a witness against myself or give

evidence against myself, and the books and records may contain certain private testimonial and personal statements and information which might be considered as so doing.

All of which Counsel has advised me and on which advice I rely, give me the right to refuse production of the records and books you referred to or answering any questions in connection with them.

Upon advice of Counsel on which advice I rely, I also refuse because of obligations imposed upon me by virtue of an attorney-client relationship.

[4]

Q. Now, are you represented, Mr. Bellis, by Louis Lipschitz?

A. Yes.

Q. And when you indicate that you are acting on the advice of Counsel, are you acting on the advice of Mr. Lipschitz?

A. Mr. Lipschitz and Mr. Sarner.

Q. Then, as I understand it, sir, you are not going to produce these records to this Grand Jury as ordered by Judge Van Artsdalen as based upon the advice of Mr. Lipschitz and Mr. Sarner?

A. My statements previously made I do represent, and that statement includes that my action is based on the advice of Counsel.

Q. All right, now we have an appointment to see Judge Van Artsdalen in regard to this at 1:20 so I'm going to direct you on behalf of the Grand Jury to appear in Courtroom Number 15 at 1:20 p.m.

(The witness was dismissed.)

(The Grand Jury was dismissed for lunch at 1:15 o'clock p.m.)

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[5]

This is to certify that the attached proceedings before the United States Grand Jury, in the Grand Jury Room, Room 12, United States Courthouse, Philadelphia, Pennsylvania, on Wednesday, May 16, 1973, was held as herein appears, and that this is the original transcript thereof for the file of the Department.

ALFRED W. KERSHAW,
Court Reporter.

Reported By:

Alfred W. Kershaw

[114]

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Miscellaneous
No. 73-95.

IN RE:

GRAND JURY INVESTIGATION
ISADORE H. BELLIS, A WITNESS.

Philadelphia, Pa., May 16, 1973.
Before HON. DONALD W. VAN ARTSDALEN, *J.*

APPEARANCES:

THOMAS A. BERGSTROM, ESQ.,
Special Attorney,
United States Department of Justice,
for the Government

LOUIS LIPSCHITZ, ESQ.,
915 Robinson Building,
Philadelphia, Pennsylvania,
for Isadore H. Bellis.

Jacob J. Comer
Official Court Reporter
Room 3054—U. S. Courthouse
Philadelphia, Pa. 19107
WAlnut 5-9480

[115]

The Court: Good afternoon, gentlemen.

Mr. Lipschitz: If Your Honor please, Mr. Bellis appeared before the Grand Jury this afternoon and on advice of counsel refused to produce any records which were chargeable to him.

The Court: Does the U. S. Attorney have any application in view of that?

Mr. Bergstrom: The application of the Government, sir, is an oral application which we would like to make at this time for an order of contempt under the provisions of Title 28, United States Code, Section 1826. As I read that section it is appropriate and applicable to a situation as this. I think it is a controlling provision, a statutory provision, which authorizes the Court to find the witness in contempt of the Grand Jury and sentence him appropriately.

Mr. Lipschitz: We submit that our refusal is based on constitutional grounds and under those circumstances Your Honor should not enter an order of contempt against Mr. Bellis. Mr. Bellis has claimed his rights under the Constitution of Pennsylvania and the United States Constitution not to produce these records.

The Court: I have of course previously ruled, as you know, that there is no privilege in this instance to refuse to comply with the subpoena duces tecum

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and made an order from the bench that Mr. Bellis comply with the terms of the subpoena on or before noon of this date.

I am filing this date also a further memorandum opinion setting forth more fully my reasons for entering that order. I believe a copy has been handed to counsel, although I don't believe the opinion has actually been filed, it will be filed today.

Also I would note that counsel did meet with me in chambers in an attempt, on the part of counsel for Mr. Bellis, to persuade me that that order in and of itself might be appealable under 28 United States Code, Section 1292(b) without the necessity of Mr. Bellis refusing to comply with the order and being held in contempt of court.

I have concluded that that could not be done and so advised counsel, and I am also filing a memorandum and order in that regard which is dated yesterday although again it was just filed this morning.

And in regard to that particular decision I want to add on record the case of the United States vs. Ryan: 402 U. S. 530, decided by the Supreme Court of the United States on May 24, 1971, which I think clearly indicates that in this type of situation the only way in which the ruling which I have made may be properly appealed is by refusing to comply with the order, being held in contempt of court and then taking the appeal from there.

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For that reason it is entirely understandable to me the reasons for Mr. Bellis, on advice of counsel, refusing to comply with the terms of the order in order that it may be appealed and reviewed on appeal.

It does seem to me that the questions involved here are certainly sufficiently uncertain as to make an appeal appropriate in this case, and that it would be helpful to the District Court in the future to have appellate review of this decision for its future guidance.

Therefore, it seems to me that in view of the rulings I have heretofore made, and the present situation, that Mr. Bellis is in contempt of court, and I do find that he is in civil contempt of court and I will summarily order confinement at a suitable place until such time as the witness is ready to give such testimony or rather to produce the books required under the subpoena duces tecum, or for the term of the Grand Jury, including extensions thereof, whichever shall first occur. In no event, however, shall the confinement exceed 18 months.

I will say further that, as I understand the law, it is appropriate, and counsel intend to appeal this order, and that under the law Mr. Bellis is entitled to bail unless there is a determination that the appeal is frivolous or taken for delay, which clearly it is not in this case, and, therefore, I will hear any application

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for bail.

Mr. Lipschitz: If Your Honor please, I wish to submit an application for stay of execution and release pending the appeal.

(Document handed to the Court.)

Mr. Lipschitz: May the record note that I was authorized to sign Mr. Sarner's name to the application, if Your Honor please. Mr. Sarner is out of town.

The Court: Do you have a copy of this?

Mr. Bergstrom: Yes, sir. I just received it.

The Court: And what is your position?

Mr. Bergstrom: I have no objection, Your Honor.

The Court: Then we will stay the execution of the judgment and sentence of contempt that has been entered

today. Mr. Bellis, the witness, will be released upon signing his own recognizance pending the taking of an appeal and decision on the appeal.

Mr. Lipschitz: Will Your Honor's set an amount for recognizance?

The Court: It may be in a nominal amount.

I take it the Government has no feeling about that?

Mr. Bergstrom: No, sir.

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The Court: We will set the amount in the sum of $100 but he may sign his own recognizance so that no security will be required.

Mr. Lipschitz: Thank you, sir.

May I take him down to the Clerk's office to sign?

The Court: Yes.

Is there a Marshal here?

(No response.)

I had asked the Marshal to come but you may go down there.

Mr. Lipschitz: All right, sir.

The Court: Anything further, gentlemen?

Mr. Bergstrom: No, sir.

Mr. Lipschitz: No, sir.

The Court: We will take a recess.

(Adjourned at 1:40 P. M.)

Reported by
Jacob J. Comer

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MISC. NO. .

IN RE: GRAND JURY INVESTIGATION
ISADORE H. BELLIS, a witness

NOTICE OF APPEAL.

Notice is given that Isadore H. Bellis, the above named witness, hereby appeals to the United States Court of Appeals for the Third Circuit from the judgment and sentence of contempt entered in this action on the 16th day of May, 1973.

LEONARD SARNER,
LOUIS LIPSCHITZ,
915 Robinson Bldg.,
Phila. Pa. 19102
Attorney for Isadore H. Bellis.

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-190

IN RE: GRAND JURY INVESTIGATION
ISADORE H. BELLIS, a Witness,

ISADORE H. BELLIS,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

LEONARD SARNER,
LOUIS LIPSCHITZ,
208 Six Penn Center Plaza,
Philadelphia, Pa. 19103
Counsel for Petitioner.

International Printing Co., 711 So. 20th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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TABLE OF CASES CITED.

MISCELLANEOUS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. .

IN RE: GRAND JURY INVESTIGATION
ISADORE H. BELLIS, a witness

ISADORE H. BELLIS, *Petitioner.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW.

The opinion of the District Court and its final written contempt order are not reported (App. A1-11). The opinion of the Court of Appeals (App. A13-16) is reported in — F. 2d — (decided 7/9/73).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 9, 1973 (App. A17). The order of the Court of Appeals denying the petition for rehearing was entered on July 20, 1973 (App. A18). The jurisdiction of this Court rests on Section 1254 of the Judicial Code.

QUESTION PRESENTED.

Whether a partner of a three-man law partnership in the process of winding up after dissolution may invoke his Fifth Amendment privilege against compulsory self-incrimination to prevent the production, pursuant to a Grand Jury Subpoena Duces Tecum, of financial books and records of the partnership in his rightful possession.

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED.

Amendment V.

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

STATEMENT OF THE CASE.

This case presents the question as to whether partnership books and records are ever protected from compulsory production on Fifth Amendment self-incrimination grounds.

The facts material to the question are not in dispute and are set forth by the Court below as follows (App. A14-15):

The subpoenaed documents are the partnership records of a three-man law partnership for the years 1968 and 1969.

The partnership also had about six additional employees. Petitioner was the senior partner and personally supervised the work of the bookkeeper. The partnership was dissolved in the latter part of 1969 and is still in the process of being wound up. After formal dissolution, the partnership records remained in the office of the partnership pending the winding up. However, at the time the subpoena was served, they were in the Petitioner's possession.

Petitioner was served with a Federal Grand Jury Subpoena directing him to appear and testify and to bring with him "all partnership records currently in your possession for the partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969." Petitioner appeared and refused to produce the documents or answer any questions in connection therewith, asserting his rights under the First, Fourth, Fifth and Sixth Amendments to the United States Constitution. Thereupon, the United States filed a motion in the district court to compel the Petitioner to produce the books and records described in the subpoena. The Petitioner confined his claim to his Fifth Amendment privilege.

The District Court ruled that since the documents were partnership papers, they were not subject to Petitioner's personal privilege. It then, under 28 U. S. C. Section 1826, ordered Petitioner held in contempt until he should produce the books and records sought (App. A11).

The Court of Appeals affirmed, stating that it was satisfied that the privilege against self-incrimination was not to apply to the possession of records of an entity such as a partnership which has a recognizable juridical existence apart from its members, although it also recognized that the decision of this Court in *United States v. White,* 322 U. S. 694 (1944) seems to lay down a more involved test (App. A15-16) .

REASONS FOR GRANTING THE WRIT.

The Decision Below Conflicts With the Decision of This Court in *United States v. White*, 322 U. S. 694 (1944), in Deciding an Important Question in the Administration of the Revenue and Criminal Laws on Which the District Courts Are Divided and for Which There Is No Precedent in the Decisions of the Courts of Appeal.

This Court has never directly decided whether the constitutional privilege against self-incrimination applies to books and records of a small closely held partnership (App. A5). It has decided that the books and records of the individual proprietor are protected (*Boyd v. United States*, 116 U. S. 616 (1896); *Couch v. United States*, 41 U. S. L. W. 4106 (1973)); that those of a corporation are not (*Hale v. Henkel*, 201 U. S. 43 (1906); *Wilson v. United States*, 211 U. S. 361 (1911)); and that for unincorporated associations or members of a collective group the test for denying the privilege is whether (*United States v. White, supra* at p. 701):

> one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.

In the thirty odd years since *White* denied the privilege to the records of a labor union, this notion of size, imper-

sonality and other circumstances have all been involved in the cases reaching this Court for decision as to the extent to which Fifth Amendment rights may be asserted with respect to business documents which might incriminate a member of an unincorporated association. Thus, although this Court has seemed to stress the question of whether the papers are held in a "representative capacity" on behalf of a "collective group" by a "custodian" performing the "duties of his office" of whom it may fairly be said that "he does not own the records and has no legally cognizable interest in them" (*McPhaul v. United States*, 364 U. S. 372, 380 (1960) (concerned with the Civil Rights Congress); *Curcio v. United States*, 354 U. S. 118, 122-123 (1957) (Labor Union); *Rogers v. United States*, 340 U. S. 367 (1951) (Communist Party); *United States v. Fleischman*, 339 U. S. 349 (1950) (Joint Anti-Fascist Refugee Committee)), the impersonal nature of each organization involved made it clear that no Fifth Amendment privilege pertained to the books and records themselves and the issues before the Court in no way involved the question of whether the books and records were themselves protected, but rather whether the witness had to explain where they were (*Curcio, Rogers*) or whether he was in possession of them at the time the subpoena to produce was served (*McPhaul, Fleischman*).

However, a number of District Courts have had to squarely face the question of whether books and records of a small, closely held partnership are "outside the private domain walled by the Fifth Amendment" (App. A5), and have divided on the issue,[1] with only two cases in the Courts

1. Compare *United States v. Cogan*, 257 F. Supp. 170 (S. D. N. Y., 1966); *United States v. Slutsky*, 73-1 U. S. T. C. § 9186 (S. D. N. Y., 1972); *United States v. Lawn*, 115 F. Supp. 74 (S. D. N. Y., 1953); *Subpoena Duces Tecum*, 81 F. Supp. 418 (N. D. Calif., 1948); *United States v. Linen Service Council*, 141

of Appeals, both of which easily met the impersonality test of the large enterprise of *White*, discussing the problem.[2]

The Court below disregarded the functional approach of *White* as to size and impersonality and applied a talismanic test to deny automatically the application of the privilege to books and records of any partnership regardless of size solely by reason of the separate legal identity of the partnership (App. A15-16). In so doing, it ignored *Boyd v. United States*, 116 U. S. 616 (1896) from which case stems the development of the Constitutional protection afforded books and records from compulsory production and which itself involved a subpoena directed to a partnership

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1. (Cont'd.)
F. Supp. 511 (D. N. J., 1956); *United States v. Brazely*, 268 Fed. 59 (W. D. Pa., 1920) holding the books and records of the small personal partnership to be within the protection of the Fifth Amendment, with *United States v. Garrison*, 348 F. Supp. 1112, 1126 (E. D. La. 1972); *United States v. Bally Manufacturing Co.*, 345 F. Supp. 410, 431 (E. D. La. 1972); *United States v. Onassis*, 125 F. Supp. 190 (D. D. C. 1954); *United States v. Onassis*, 133 F. Supp. 327 (S. D. N. Y., 1955); *United States v. Quick*, 336 F. Supp. 744 (S. D. N. Y., 1972); *In Re Grand Jury Subpoena Duces Tecum*, (D. Md., Civil No. 72-292-B, April 23, 1973) holding that they are not.

2. *In Re Mal Brothers Contracting Co.*, 444 F. 2d 615 (CA 3, 1971) and *United States v. Silverstein*, 314 F. 2d 789 (CA 2, 1963). In *Mal Brothers*, the entity employed 200-250 persons a year, with an annual payroll in excess of a million dollars and receipts in excess of two million dollars a year, excluding joint ventures with other companies, owned equipment of approximately one million dollars, with none of the partners being engineers of familiar with the accounting and bookkeeping end of the business. *Silverstein* involved a general partner of five limited partnerships having limited partners numbering from about 25 to 147 and a capitalization of upwards five million dollars, with the managerial general partner working with other peoples' money under defined delegations of authority and responsibility. In addition, the case of *United States v. Warnes*, 157 F. 2d 797 (CA 5, 1946), cited in *Silverstein*, involved a subpoena issued to an officer of various corporate and unincorporated organizations, with the Fifth Amendment privilege denied without any meaningful discussion as to the nature of the organizations.

for which a general partner was entitled to refuse to produce documents incriminating in content, and the teachings of *Couch v. United States, supra,* that with co-ownership and rightful, peaceful possession vested in Petitioner, Government compulsion by enforcing the subpoena against the person of Petitioner must be denied.

In *White,* this Court, had it wanted to, could easily have stated that when more than one person engages in a joint enterprise, the privilege is lost and is allowed only for the sole proprietor. That this Court contemplated that people could associate as partners or jointly with others in a common enterprise and still have the protection of the Fifth Amendment privilege is evident from the use of the plural "constituents" in the impersonality test set forth above, when the Court said that

> a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its *constituents,* but rather to embody their common or group interests only (italics supplied).

By the use of the plural instead of the singular, this Court did and intended to indicate that small organizations such as the intimate association of members of a small law firm continue to embody and represent the purely private or personal interests of the constituents rather than the common or group interests only.

The decision below, if allowed to stand, has far reaching and continuing implications on Constitutional protection afforded books and records from compulsory production in the administration of the Internal Revenue and criminal laws. The use of the small partnership or joint enterprise entity to engage in business and business trans-

actions is legion. The suggestion that books and records are said to be within the ambit of Fifth Amendment witness privilege only when he is a sole proprietor, and then regardless of the size or capitalization of his enterprise or the number of his employees, serves no meaningful purpose. The instant case presents an appropriate occasion for this Court to define the limits to which the Internal Revenue Service and the criminal arms of the federal and state governments may compel production of books and records of closely held, unincorporated partnerships and associations in accordance with the dictates of this Court in the *White* and *Boyd* cases.

CONCLUSION.

The decision below is incorrect. There is conflict with the pronouncements of this Court in *White* and *Boyd*. The occasion is appropriately presented for this Court to define the realistic confines of the application of Fifth Amendment protection to compulsory production of books and records of small partnerships and organizations which continue to embody and represent the purely private or personal interests of the constituents rather than common or group interests only. The petition for writ of certiorari should, therefore, be granted.

Respectfully submitted,

LEONARD SARNER,
LOUIS LIPSCHITZ,
Counsel for Petitioner.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MISC. NO. 73-95.

IN RE: GRAND JURY INVESTIGATION

ISADORE H. BELLIS, A WITNESS

MEMORANDUM OPINION.

VANARTSDALEN, *J.* May 16, 1973

This opinion is made to set out more fully the reasoning of the court with regard to the bench order issued on May 10, 1973.

On May 1, 1973, Isadore H. Bellis was served with a federal grand jury subpoena directing him to appear before the federal grand jury and bring with him certain books and records, specifically "all partnership records currently in your possession for the partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969."

Mr. Bellis appeared before the grand jury on May 9, 1973, and at that time refused to produce the books and records listed in the subpoena, asserting his rights under the First, Fourth, Fifth and Sixth Amendments to the United States Constitution. The witness was brought before this court on May 9, 1973 for hearing. A full hearing was held on that date and was continued over and completed on May 10, 1973. At the conclusion of the hearing an order was entered, directing the witness to produce the records sought in the subpoena, limited however by excluding from the demand any client files.*

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* See *infra,* p. 9 for further discussion of scope.

The subpoenaed documents, partnership records of the law firm of Bellis, Kolsby & Wolf for the years 1968 and 1969, are in the possession of the witness, having been removed from the offices of Bellis, Kolsby and Wolf by Mrs. Harriet Lippman, secretary to Mr. Bellis, and brought to the offices of Mr. Bellis' present firm.[1]

Possession of the records, by the witness, has therefore been established.

The witness has filed a motion to quash the subpoena, asserting as justification for his resistance:

> A. The privilege which he claims is available to him as a former member of the partnership in question;
>
> B. That the partnership papers that Isadore H. Bellis is alleged to have withheld are his personal and private papers and entitle him to assert his rights under the Constitution of the United States as aforesaid;
>
> C. That these are not impersonal records and may contain private testimonial and personal information, disclosure of which may be in violation of his rights as aforesaid;
>
> D. That he has all of the rights of ownership and possession and that no one is authorized to waive any of his personal rights nor does anyone have any rights superior to his.

The privilege against self-incrimination, guaranteed by the Fifth Amendment to the United States Constitution, "has often been stated by this Court and need not be elaborated." *Couch v. United States,* — U. S. —, 41 U. S. L. W. 4107, 4109 (1973) (citations omitted).

1. N. H. — [The transcript has not yet been prepared.]

> It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information which may incriminate him. As Mr. Justice Holmes put it: "A party is privileged from producing the evidence but not from its production." *Johnson v. United States,* 228 U. S. 457, 458 (1913). (*Id.*) (emphasis in original).

Generally, a bare assertion of privilege is insufficient. There must be some showing of entitlement beyond mere assertion. Possible incrimination need not be *conclusively* shown, but rather that it appears from all the circumstances that an answer would either directly incriminate the witness or provide a link in the chain of evidence which, taken as a whole, could incriminate him. Here, the witness claims that he is privileged from producing books and records. If the subpoena, on its face, indicates susceptibility to production on an impersonal basis, the burden would shift to the witness to demonstrate the personal nature of the documents to the witness to demonstrate the personal nature of the documents to remove them from the power of the subpoena. Since, as is set out more fully below, there is no personal privilege in corporate or other impersonal records, even if they would incriminate the custodian, once the nonpersonal nature is apparent, the burden must logically shift to the witness to overcome the showing.

However, construing the claim of privilege[2] in a light most favorable to the witness, I will follow, *arguendo,*

2. The court was concerned about a possible problem of incrimination incident to the removal of the records from the offices of Mr. Bellis' former partners. It was conceivable to the court that if the removal were unauthorized, the witness might be subject to prosecution in state court for theft or embezzlement. Therefore I called this problem to the attention of counsel. No claim of privilege vis-a-vis *this* question is before the court, since no such claim was made. The witness is of course an attorney himself and was ably represented by two distinguished attorneys.

United States v. Cogan, 257 F. Supp. 170, 172 (S. D. N. Y. 1966), which held that

> the burden of demonstration is upon the Government when it claims that a man's papers, because he shares their ownership with others, are outside the private domain walled by the Fifth Amendment.

Applying that principle to the facts of this case, the burden would be on the government to show that the sought-after documents are not the personal or private papers of the witness. That burden has been met, as the following discussion shows, and the efforts of the witness to argue against that conclusion, in actuality, only serve to enforce it.

The partnership in question, Bellis, Kolsby & Wolf, until its dissolution in 1969, was a law partnership composed of "three law partners, one fulltime attorney-employee, occasionally a parttime attorney-employee, a receptionist-telephone clerk and three secretaries." (Memorandum in support of motion to quash, at 2). In addition, the services of an independent accountant were retained N. H.*).

It has long been recognized that a corporation may not invoke a Fifth Amendment privilege as to corporate records even if the production of those records would tend to incriminate the custodial officer, *Wilson v. United States,* 221 U. S. 361 (1911), and even if the corporation has been dissolved. *Wheeler v. United States,* 226 U. S. 478 (1913). In *United States v. White,* 322 U. S. 694, 701 (1944), the privilege was denied to a labor union and the Court promulgated the following "test":

> The test, rather, is whether one can fairly say under all the circumstances that a particular type of organi-

* See n. 1, *supra.*

> zation has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.

In the thirty-odd years since *White*, the Court has not passed on the question whether the records of a partnership are "outside the private domain walled by the Fifth Amendment". *Cogan, supra. Cogan* notwithstanding, it appears by the weight of lower court authority that they are.

The question was carefully considered in *In re Mal Brothers Contracting Co.*, 444 F. 2d 615 (3rd Cir.), *cert. denied*, 404 U. S. 857 (1971). In that case a partner's claim of privilege was overruled, on the basis of the *White* test:

> The intimation in *White, supra*, that the privilege of asserting the 5th Amendment might be dependent upon the degree of impersonality of the organization asserting it must be deemed not essential to the core of the decision and the test that it makes requisite.
>
> Following *White* the Supreme Court has routinely denied the 5th Amendment privilege to unincorporated associations without discussion of size, impersonality or other circumstances. (citations omitted).
>
> However, when we examine the findings of fact made by the court below, we can clearly see that they were not erroneous and that even if we accept the impersonality test, this entity contravenes it by reason of the fact that the court found that the entity employed 200 to 250 persons a year with an annual payroll in excess of $1,000,000; that its annual receipts

were approximately $10,000,000 a year excluding joint ventures with other companies; and that it owned equipment valued at approximately $1,000,000. Further, none of the partners in the entity were engineers or were familiar with the accounting and bookkeeping end of the business.

In our judgment, it is essentially clear that the defendants here had all the aspects of a corporate enterprise and that there was nothing personal or private in connection with the papers solicited from them under the subpoena herein. There can be no rational basis for upholding a claim to 5th Amendment protection to conduct a business operation as a personal rather than a corporate operation. (*Id.* at 618).

Production has also been upheld in *United States v. Garrison*, 348 F. Supp. 1112, 1126 (E. D. La. 1972); *United States v. Bally Manufacturing Corp.*, 345 F. Supp. 410, 431 (E. D. La. 1972).

However, the most recent and most compelling examination of the problem is found in *In Re Grand Jury Subpoena Duces Tecum*, — F. Supp. — (D. Md. 1973) (Civ. No. 72-292-B, April 23, 1973) (Opinion of Blair, J.). In that case Judge Blair was faced with a question on all fours with the one presently before this court.[3] Judge Blair stated the issue as follows:

> That is, whether, under the facts here present, a partner in a law firm has such a personal interest in the files of that firm so that he may assert his Fifth Amendment privilege against self-incrimination as a bar to the involuntary production of these files. This court concludes he may not. (Opinion at 5).

3. It should also be pointed out that Judge Blair was faced with the same paucity of record which faces this court (Opinion at 17-18).

After discussing the development of the privilege from the early cases, the court stated that it was

> unable to agree with those cases which look to size as the most important criterion in determining the personality of an organization. Therefore, it does not agree with the movant's position that a law firm having four partners is a small personal organization merely because it has only four members. A careful reading of *White* indicates to this court that the considerations which influenced the Supreme Court in reaching its decision transcend notions of size and are equally applicable to all organizations, both the large and the small. (*Id.* at 11).

The reasoning is eminently sensible. Starting from the premise that the privilege is entirely personal, and, in the above-quoted words of Mr. Justice Holmes, protects a person "from producing the evidence but not from its production", it is plainly evident that the records in this case are beyond the pale of the personal privilege. An appropriate analogy can be drawn from *Couch, supra.* In that case it was held that the personal records of a taxpayer, delivered to her accountant, were subject to a subpoena directed to the accountant and that the taxpayer could not assert a personal privilege in them, even though, had she herself retained them, a privilege would lie. In the present case, even though the witness may have included certain personal records or personal information in the partnership records, this fact alone does not render the records subject to the protection of a purely personal privilege. As was pointed out in *United States v. Onassis,* 133 F. Supp. 327, 332 (S. D. N. Y. 1955):

> If [a partner] has voluntarily included certain admissions within the records of the partnership, by so doing

> he placed these admissions beyond his power to suppress and within the control of each of his seven partners to treat as partnership property as well as to inspect and copy. (footnote omitted).

Therefore, once Bellis inserted personal data into the partnership records, he lost control over, and expectation of privacy in, such data just as effectively as Couch did in turning over personal records to her accountant. He cannot now be heard to claim a privilege in something which he long ago exposed to the eyes of his partners and accountant.

It is, therefore, appropriate to hold that the records of the law partnership of Bellis, Kolsby & Wolf are not personal records and are, therefore, subject to subpoena. The principles of *White* and *Mal Brothers* point in this direction and the holding of *In re Grand Jury Subpoena Duces Tecum* conclusively demonstrates it. It comes down to a basic question of whether or not to exalt form over substance, and so stated, there can be only one answer as taught by the cases. The records must be produced.

Bellis also contends that since the records are in his ownership and possession, the effect of production would be to compel him to incriminate himself. *Couch, supra* lends the witness no support. Primarily these records are those of the partnership, and the mere fortuitous (or deliberate) insinuation of the records into the possession of the witness in no way changes this fact. The records, once having been partnership records and, therefore, owned in common,[4] remain so even after dissolution and are still subject to subpoena. *Wheeler v. United States, supra.* Although the government strongly urged the rationale of a "superior right" argument, citing *United States v. Egenberg,* 443 F. 2d 512 (3rd Cir. 1971), such an argument, while possibly sound if we view this witness as possessing papers

4. *Cf.* 59 P. S. § 52.

of a third party (the partnership) for a temporary agency purpose (custodial possession), is unnecessary since it is of paramount significance that, right of possession or no right of possession, the papers are not personal except for certain parts which were at one time, but have long since lost any claim to "personality", having been once included in the impersonal partnership records. Reliance by the witness on *United States v. Cohen*, 388 F. 2d 464 (9th Cir. 1967), is misplaced. Even if Cohen were to be accepted as authority,[5] it is plainly distinguishable in that the records there sought could not be characterized as impersonal, and, the *Cohen* court recognized,

> It is also settled that the production of such records [of a corporation or other impersonal organization] may be compelled even though a natural individual claiming privilege has acquired both possession and title. 388 F. 2d at 470-71 (citations omitted).

To paraphrase *United States v. Onassis*, 125 F. Supp. 190, 210 (D. D. C. 1954):

> The right of Mr. [Bellis] not to cooperate with the [government] in such manner as will assist in his prosecution is paramount. Yet the right of the [government] to prosecute for crime should not be hindered by theoretical infringements on individual's rights. The infringement must be real, and it is not real unless the documents are personal. There has been no real infringement here.

The asserted Fifth Amendment privilege must be denied.

---

5. *See Egenberg, supra*, at 518. *Cohen*, however, may have been "rehabilitated" by *Couch, supra*, 41 U. S. L. W. 4110, n. 12.

The witness also asserts First, Fourth and Sixth Amendment claims. These claims, never explicated, must also be rejected.

Therefore, the order entered on May 10, 1973 was proper. By the terms of that order, the witness was directed to produce, on or before 12:00 Noon, Wednesday, May 16, 1973, those books and records called for in the subpoena, with the exception of any client case files. All financial records, as demanded by the subpoena will be produced. Any dispute over, misunderstanding of, or clarification of the scope of the order may be brought before this court at any time by either the witness or the government.

BY THE COURT:

DONALD W. VANARTSDALEN, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MISC. NO. 73-95.

IN RE: GRAND JURY INVESTIGATION.
ISADORE H. BELLIS, a witness.

ORDER.

VANARTSDALEN, *J.* June 29, 1973

AND NOW, this 29th day of June, 1973, this order is entered nunc pro tunc in accordance with a bench order entered and effective as of Wednesday, May 16, 1973 at 1:40 o'clock, P. M. it appearing that Isadore H. Bellis failed to comply with an order of this Court dated May 10, 1973 directing Isadore H. Bellis to produce before the Grand Jury sitting in this district certain books, records and documents on or before 12 o'clock noon, May 16, 1973, the Court hereby finds, adjudges and decrees that Isadore H. Bellis is in civil contempt of court, and therefore

Summarily orders and directs that Isadore H. Bellis be confined in a suitable place until such time as he is willing to produce the books, records and documents to the Grand Jury as required by the Order of this Court dated May 10, 1973, or for the term of the Grand Jury, including extensions thereof, whichever shall first occur. In no event however, shall confinement exceed 18 months.

This order is entered pursuant to 28 USC § 1826.

Isadore H. Bellis may at any time purge himself of this contempt upon producing said books, records and documents before the Grand Jury.

BY THE COURT:

DONALD W. VANARTSDALEN, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Misc. No. .

IN RE: GRAND JURY INVESTIGATION

ISADORE H. BELLIS, a witness

NOTICE OF APPEAL.

Notice is given that Isadore H. Bellis, the above named witness, hereby appeals to the United States Court of Appeals for the Third Circuit from the judgment and sentence of contempt entered in this action on the 16th day of May, 1973.

LEONARD SARNER,
LOUIS LIPSCHITZ,
915 Robinson Bldg.,
Phila. Pa. 19102
Attorney for Isadore H. Bellis.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1514

IN RE: GRAND JURY INVESTIGATION

ISADORE H. BELLIS, a witness,

ISADORE H. BELLIS,

Appellant.

(D. C. Misc. No. 73-95)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued July 2, 1973

Before: SEITZ, *Chief Judge*, GIBBONS and HUNTER, *Circuit Judges.*

Louis Lipschitz, Esquire
Lipschitz & Danella
Leonard Sarner, Esquire
Attorneys for Appellant.

Peter F. Vira, Esquire
Thomas A. Bergstrom, Esquire
Special Attorneys, United States Department of Justice
Attorneys for Appellee.

OPINION OF THE COURT

(Filed July 9, 1973)

SEITZ, *Chief Judge.*

The district court found appellant in civil contempt and entered an appropriate order. Appellant appeals that order.

Appellant poses the following single issue:

> Whether a partner of a three-man law partnership in the process of winding up after dissolution may invoke his Fifth Amendment privilege against compulsory self-incrimination to prevent the production, pursuant to a Grand Jury Subpoena Duces Tecum, of financial books and records of the partnership in his possession.

Appellant Bellis was served with a Federal Grand Jury Subpoena directing him to appear and testify and to bring with him "all partnership records currently in your possession for the partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969." Appellant appeared and refused to produce the documents or answer any questions in connection therewith, asserting his rights under the First, Fourth, Fifth and Sixth Amendments to the United States Constitution. Thereupon, the United States filed a motion in the district court to compel the appellant to produce the books and records described in the subpoena. The issue is limited, at least at this stage, to the production of documents.

A hearing was held before the district court on the government's contempt motion. The appellant confined his claim to his Fifth Amendment privilege. The district court ruled, inter alia, that since the documents were partnership papers, they were not subject to appellant's personal privilege. He thereupon ordered appellant to comply with the subpoena. The court excluded from its order, "any individual client files containing any advice and confidential

relationships between the attorney and attorney and client."

The appellant reappeared before the Grand Jury and on the advice of counsel repeated his refusal to produce the subpoenaed records, inter alia, on the same constitutional grounds. Thereupon the Government orally moved before the district court in the presence of appellant's counsel for a contempt order. Such an order was entered and this appeal followed.

Fortunately, the facts material to our disposition of this case are not in dispute. The subpoenaed documents are the partnership records of a three-man law partnership for the years 1968 and 1969. The partnership also had about six additional employees. Appellant was the senior partner and personally supervised the work of the bookkeeper. The partnership was dissolved in the latter part of 1969 and is still in the process of being wound up. After formal dissolution, the partnership records remained in the office of the partnership pending the winding up. However, at the time the subpoena was served, they were in the appellant's possession.

The sole issue is whether an individual partner, assumedly in lawful possession of partnership records of a dissolved partnership, may refuse to produce such records on the ground that such production would violate his Fifth Amendment rights.

The judicial history of the privilege against self-incrimination is tortuous to say the least. But we are satisfied that it was not intended that the privilege was to apply to the possession of records of an entity such as a partnership which has a recognizable juridical existence apart from its members. We say this because the privilege has always been regarded as personal in the sense that it applies only to an individual's words or personal papers. *United States v. White,* 322 U.S. 694 (1944). Since the subpoena and implementing order only directed the production of records of a partnership, certainly a separate

legal entity, it follows that their production would constitute no encroachment on the appellant's privilege with respect to his personal records.

We recognize that *United States v. White, supra,* seems to lay down a somewhat more involved test. However, we think our conclusion is consistent with the fundamental approach of that decision.

Appellant would have us distinguish between the records of a large, presumably impersonal, partnership and those of a small law firm. In this way he would distinguish our conclusion in *In re Mal Bros. Construction Co.,* 444 F.2d 615 (3d Cir. 1971). Not only is the distinction inconsistent with the dictum in that case, but more to the point, it would suggest a test which tends to ignore the fact that only the records of the separate entity are involved and loses sight of the personal nature of the privilege.

We think the district court correctly decided that the appellant was not entitled to assert a personal privilege with respect to the partnership records in his possession despite the modest size of the partnership entity.

The order of the district court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1514.

IN RE: GRAND JURY INVESTIGATION
ISADORE H. BELLIS, a witness,

ISADORE H. BELLIS,

Appellant.

(D. C. Misc. No. 73-95)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: SEITZ, *Chief Judge* and GIBBONS and HUNTER, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed June 29, 1973 and entered nunc pro tunc as of May 16, 1973, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

M. ELIZABETH FERGUSON,
Chief Deputy Clerk.

July 9, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1514.

IN RE: GRAND JURY INVESTIGATION
ISADORE H. BELLIS, a witness,

ISADORE H. BELLIS,

Appellant.

ORDER SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER and WEIS, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been sumitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

COLLINS J. SEITZ,

Judge.

Dated: July 20, 1973

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-190

ISADORE H. BELLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A14-A16) is not yet reported. The opinion of the district court (Pet. App. A1-A10) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1973, and a petition for rehearing was denied July 20, 1973. The petition for a writ of certiorari was filed on July 27, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a former partner in a dissolved law partnership was correctly held not entitled to invoke the Fifth Amendment privilege against self-incrimination as a

ground for refusing to produce business records maintained by the partnership while he was a member, where such records had come into his possession after the dissolution.

CONSTITUTIONAL PROVISION INVOLVED

The pertinent portion of the Fifth Amendment is set forth at page 2 of the petition.

STATEMENT

A federal grand jury subpoena directed petitioner, a lawyer, to produce all the books and records of the law partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969 that were then in his possession (Tr. 2, 4-5).[1] Petitioner appeared before the grand jury, but refused to produce any of the documents, relying on his privileges under the First, Fourth, Fifth and Sixth Amendments.[2] He also refused to state whether he had the documents called for by the subpoena, relying on his Fifth Amendment privilege (Tr. 60-61).

The government moved to enforce the subpoena and after an evidentiary hearing the district court ruled that the records were "beyond the pale of the personal privilege" of the Fifth Amendment. However, it limited the subpoena to exclude confidential client files (Pet. App. A1, A7; Tr. 105-106). In its order, the court also directed the petitioner to turn over (Tr. 106) "any cash receipt books, cash disbursement books or

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[1] "Tr." references are to the transcript of proceedings in the district court.

[2] Petitioner confined his argument before the district court and the court of appeals to the Fifth Amendment privilege (Pet. App. A10, A14).

books of records and accounts of the partnership for the years in question." Upon petitioner's refusal to comply, the district court held him in civil contempt. (Pet. App. A11). The Third Circuit affirmed. (Pet. App. A14-A16).

At the district court hearing, the evidence showed that in 1968 and 1969 petitioner was a partner in Bellis, Kolsby & Wolf, a three-man law firm with five or six employees (Tr. 67). Petitioner's secretary, Mrs. Harriet Lipman, also served as the firm's bookkeeper, and, as such, she made the entries for receipts and disbursements, wrote checks and performed other bookkeeping duties under the supervision of the firm's outside accountant (Tr. 67-68). Mrs. Lipman testified that, in addition to herself, the three partners in the firm as well as the outside accountant and his staff, had access to the books of the firm (Tr. 77).

The personal expenses of the partners were sometimes reflected on the books of the firm. From time to time Mrs. Lipman was instructed to pay country club bills or restaurant charges with partnership checks (Tr. 79-80). The bills were usually broken down into business and personal expenses, and any personal expenses would be charged to the drawing account of the partner involved (Tr. 79-80). The firm's outside accountant was also given access to these records in order to enable him to prepare the partnership tax returns (Tr. 81).

In late 1969 or early 1970 the partnership was dissolved and petitioner and Mrs. Lipman left the premises (Tr. 69, 81-82). Petitioner thereupon joined another law firm (Tr. 66, 69). The records of the Bellis, Kolsby & Wolf partnership were left in petitioner's old office, where Mrs. Lipman had kept them while he was a member of that firm (Tr. 69-70). From time to time

Mrs. Lipman went at petitioner's request to this office to get information from the records or to bring back files which the petitioner needed (Tr. 70-71, 82-83).

In late February or early March 1973, petitioner or his attorney instructed her to bring to his office the records at issue in this proceeding (Tr. 71, 84-85). At this time she went over to the office where these records were stored, spoke to the secretary of one of petitioner's former partners, and "took what [she] could carry." (Tr. 71.) Over the next week or so she made four or five trips to complete the removal of the records (Tr. 85). The records which she removed at this time included the firm's cash receipts journals and probably the accounts receivable ledgers for 1968 and 1969 (Tr. 85-87).

ARGUMENT

1. In concluding that petitioner could not invoke the Fifth Amendment privilege against self-incrimination to refuse to produce business records maintained by his former law firm during the period when he was a member, the court of appeals correctly applied the principles announced in *United States* v. *White*, 322 U.S. 694. There, this Court held that "[s]ince the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization * * *" (322 U.S. at 699). The Court accordingly ruled that an officer of an unincorporated labor union could not refuse to produce the official records and documents of the union which were in his possession on the ground that they might tend to incriminate the union or himself as an officer and individually. Distinguishing between the personal records of an individual and those which he holds on behalf of an organization, the Court stated that (322 U.S. at 699-700):

> * * * [s]uch records and papers are not the private records of the individual members or officers of the organization. Usually, if not always, they are open to inspection by the members and this right may be enforced on appropriate occasions by available legal procedures. [Citation omitted.] They therefore embody no element of personal privacy and carry with them no claim of personal privilege.

The records sought in this case are official records and documents of the Bellis, Kolsby & Wolf partnership rather than personal documents belonging to petitioner Bellis. The cash receipts and cash disbursements journals of the firm are typical of the category of documents whose production was requested. These journals were kept by one of the firm's employees who served as bookkeeper, they reflected transactions in which each of the partners had a direct interest to the extent of his share of the profits and losses of the firm, and they were used by the firm's outside accountant to prepare its partnership tax returns. (Tr. 67, 81.) Under these circumstances, they were partnership records and not petitioner's private and personal papers; nor were they in his possession in a purely personal capacity.[3] *United States* v. *Onassis*, 133 F. Supp. 327, 331-332 (S.D.N.Y.); cf. *Boyd* v. *United States*, 116 U.S. 616 (1886). See also *Couch* v. *United States*, 409 U.S. 322, 330 n. 10, 335.

In formulating a rule for the applicability of the Fifth Amendment privilege to the records of unin-

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[3] The fact that the partnership was dissolved before the subpoena was served did not alter the character of the records as partnership records. Similarly, the fact that petitioner's former partners were willing to make the records in question available to him did not make them any the less partnership records.

corporated associations, the court in *White* stated that the test is (322 U.S. at 701):

> * * * whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.

Petitioner urges (Pet. 7) that under this test the records of a small three-man partnership are protected by the privilege. The Court's formulation, however, cannot be reduced to a simple proposition based upon the size of the organization. By distinguishing between an organization which embodies the "purely private or personal interests" of its members and those which embody only "common or group interests," it appears that the Court meant to protect organizations such as family units, where personal interests predominate. Where, as here, three individuals hold themselves out for the purpose of practicing a profession and sharing profits therefrom, the partnership records would reflect only their "common or group interests" under the standards of the *White* case.

2. The decision below is entirely consistent with this Court's interpretations of *United States* v. *White, supra.* On two occasions since *White,* this Court has held that the records of an unincorporated association were not privileged under the Fifth Amendment without discussion of the size of the organization, its degree of impersonality, or the scope of its activities.

McPhaul v. *United States*, 364 U.S. 372, 380; *Curcio* v. *United States*, 354 U.S. 118. In *McPhaul* the court stated that (p. 380) "it is well settled" that the privilege could not be invoked by an officer of the Civil Rights Congress with respect to records of that organization held by him in a representative capacity. Contrary to petitioner's assertion (Pet. 4-5), these decisions did not rest upon the "size" and "impersonality" of the organization but upon the fact that the organization's records were not the personal property of the individual claiming the privilege. That same reasoning applies in the present case and it is immaterial that the organization here is only a three-man partnership.[4]

Similarly, in *In re Mal Brothers Contracting Co.*, 444 F. 2d 615 (C.A. 3), certiorari denied, 404 U.S. 857, the court rejected a claim of privilege invoked by a partnership which opposed a federal grand jury subpoena to produce certain of its records, primarily accounting records, relating to a joint venture in which the partnership had participated. After reviewing the authorities, the court pointed out that (p. 619)—

> * * * it is essentially clear that the defendants here had all the aspects of a corporate enterprise and

---

[4] *See In re Grand Jury Subpoena Duces Tecum*, Civil No. 72-292-B (D. Md., Apr. 23, 1973), where the district court was faced with a claim almost precisely identical to petitioner's contention in the present case. There the court rejected the claim that "a law firm having four partners is a small personal organization merely because it has only four members" (Op. 11) and refused to permit a partner in the firm to claim his Fifth Amendment privilege with respect to production of records of the firm. The court concluded that the privilege of a member of an unincorporated association could only be raised where the identity of the association and the member were coincident.

that there was nothing personal or private in connection with the papers solicited from them under the subpoena herein.

Moreover, in *United States* v. *Wernes*, 157 F. 2d 797, the Seventh Circuit relied upon the fact that the records of an unincorporated oil drilling venture were not the "private property" of the defendant, "or at least in his possession in a purely personal capacity" (*id.*, p. 800), in refusing to apply the Fifth Amendment privilege to such records. In *United States* v. *Silverstein*, 314 F. 2d 789, certiorari denied, 374 U.S. 807, the Second Circuit upheld an order enforcing an Internal Revenue summons directed against one of three general partners, all of whom were members of the same family, who directed a real estate and rental management business. Although the court noted that the considerable size of the enterprises and the interests of numerous limited partners in each of the ventures made it analogous to a group of corporations the records of which are not privileged, it nevertheless drew the *White* distinction between purely private or personal records and representative possession of records of "corporations, limited partnerships or other entities * * *." (314 F. 2d at 791).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
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SCOTT P. CRAMPTON,
Assistant Attorney General.
JOHN P. BURKE,
MICHAEL J. ROACH,
Attorneys.

SEPTEMBER 1973.

DOJ-1973-09

No. 73-190.

Supreme Court of the United States

October Term, 1973.

ISADORE H. BELLIS,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE PETITIONER.

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IN THE

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Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals (A. *13-16) is not yet reported. The opinion of the District Court (A. *1-11) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 9, 1973 (A. *17) and the petition for rehearing was denied on July 20, 1973 (A. *18). The petition for a writ of certiorari was filed on July 27, 1973 and was granted on October 15, 1973. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

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* Page references to Appendix marked with an asterisk are to the Appendix to the Petition for Certiorari. Without an asterisk they are to the Single Appendix.

QUESTION PRESENTED.

Whether a partner of a three-man law partnership in the process of winding up after dissolution may invoke his Fifth Amendment privilege against compulsory self-incrimination to prevent the production, pursuant to a Grand Jury subpoena duces tecum, of financial books and records of the partnership in his rightful possession.

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED.

Amendment V.

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

STATEMENT OF THE CASE.

This case presents the question as to whether partnership books and records are ever protected from compulsory production on Fifth Amendment self-incrimination grounds.

The facts material to the question are not in dispute and are set forth by the Court below as follows (A. *14-15):

The subpoenaed documents are the partnership records of a three-man law partnership for the years 1968 and 1969. The partnership also had about six additional employees. Petitioner was the senior partner and personally supervised the work of the bookkeeper.[1] The partnership was dissolved in the latter part of 1969 and is still in the process of being wound up. After formal dissolution, the partnership records remained in the office of the partnership pending the winding up. However, at the time the subpoena was served, they were in the Petitioner's rightful possession.[2]

Petitioner was served with a Federal Grand Jury Subpoena directing him to appear and testify and to bring with him "all partnership records currently in your possession for the partnership of Bellis, Kolsby & Wolf for the years

1. Petitioner's secretary testified that she was also the office manager and bookkeeper of the firm (A. 82); that her duties in connection with the books of the firm were, under the supervision of the firm's accountant, to make the entries, to enter receipts and disbursements, write checks and the like (A. 83); that personal expenses of the partners were sometimes reflected on the books of the firm; that from time to time she was instructed to pay country club bills or restaurant charges with partnership checks (A. 92-93); that the bills were usually broken down into business and personal expenses and any personal expenses would be charged to the drawing account of the partner involved (A. 92-93); and that the firm's accountant was also given access to these records in order to enable him to prepare the partnership tax returns (A. 94).

2. The Court below stated the sole issue to be "whether an individual partner, assumedly in lawful possession of partnership records of a dissolved partnership, may refuse to produce such records on the ground that such production would be in violation of his Fifth Amendment rights (A. *15).

1968 and 1969". Petitioner appeared and refused to produce the documents or answer any questions in connection therewith, asserting his rights under the First, Fourth, Fifth and Sixth Amendments to the United States Constitution. Thereupon, the United States filed a motion in the District Court to compel the Petitioner to produce the books and records described in the subpoena. The Petitioner confined his claim to his Fifth Amendment privilege.

The District Court ruled, inter alia, that since the documents were partnership papers, they were not subject to Petitioner's personal privilege. It then, under 28 U. S. C. 1826, ordered Petitioner held in civil contempt until he should produce the books and records sought (A. *11). However, the Court excluded from its Order "any individual client files containing any advice and confidential relationships between the attorney and attorney and client" (A. *14-15; A. 116), but did require that Petitioner turn over "any cash receipts books, cash disbursement books or books of records and accounts of the partnership for the years in question" (A. 116).

The Court of Appeals affirmed, stating that it was satisfied that the privilege against self-incrimination was not to apply to the possession of records of an entity such as a partnership which has a recognizable juridical existence apart from its members, despite the modest size of the partnership entity, although it also recognized that the decision of this Court in *United States v. White*, 322 U. S. 694 (1944) seems to lay down a more involved test (A. *15-16).

SUMMARY OF ARGUMENT.

The Court below erroneously held that a partner in a three-man law partnership may not invoke his Fifth Amendment privilege against compulsory self-incrimination to prevent the production, pursuant to a Grand Jury subpoena duces tecum, of financial books and records of the partnership in his rightful and lawful possession. In so doing, it ignored the basic concepts underlying one's right to assert his Fifth Amendment privilege as formulated by this Court.

The incriminating nature of the partnership books is testimonial or communicative. They contain records of receipts and disbursements and transactions with clients. In addition there is present the communication inherent in admitting their identity and authenticity in response to the subpoena. *Schmerber v. California,* 384 U. S. 757 (1966). Petitioner is in possession of the sought after documents, the subpoena duces tecum is addressed to him. Thus, the ingredient of personal compulsion (the essential element found lacking in *Couch v. United States,* 409 U. S. 322 (1973)) is obviously present here.

There is no difference between compelling a man to produce his private books and papers to be used in evidence against him, and compelling him to be a witness against himself. *Boyd v. United States,* 116 U. S. 616 (1896).

Although the partnership books and records may not have been Petitioner's private property, they were held in Petitioner's possession in a purely personal capacity within his private enclave, sufficient for assertion of the privilege. *United States v. White,* 322 U. S. 694 (1944); *Murphy v. Waterfront Commission,* 378 U. S. 52 (1964).

Petitioner's Fifth Amendment claim thus must be respected unless there is something significantly unique about the nature of the books and records of a small, closely held law partnership. We submit there is not.

It is settled that a corporation is not protected by the constitutional privilege against self-incrimination. *Hale v. Henkel,* 201 U. S. 43 (1906). Nor may a custodian of the corporate books and records withhold them on the ground that he personally might be incriminated by their production. *Wilson v. United States,* 221 U. S. 361 (1911). Even after the dissolution of a corporation and the transfer of its books to its sole stockholder, he may not invoke the privilege with respect to the former corporate records. *Grant v. United States,* 227 U. S. 74 (1913). This is based in part on the visitorial powers doctrine inherent in the state charter of the corporation. Thus, when documents are held by a custodian in a representative capacity, the size and character of the corporate or other entity he represents is immaterial.

On the other hand, recognizing that the visitorial powers doctrine would not be sufficient to explain the Government's legitimate need also to regulate and inspect economically influential unincorporated associations, the Court in *White* formulated the test for denying the privilege to such organization to be whether

> "one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity."

Structurally and functionally, the instant three-man law partnership embraces a degree of privacy which attends the inspection and disclosure of its records, a degree of intimacy of the information they contain and a field of com-

mon endeavor embodying substantially identical (i.e. personal) interests of each of the members, all factors opposed to organized institutional activity. Just as in a sole proprietorship, the partnership books and records in their creation, maintenance and intimacy were no more distinct from the individually owned books and records of the partners than would be true if each were practicing law as a sole practitioner.

The nature of the small law firm as a common enterprise with an identified and limited number of interested law partners engaged in practicing their profession, with the books properly recording elements of both partnership business and individual personal expenses, and with the right of each of the three partners but no other individuals to inspect the books, embodies and represents the private and personal interests of each of the members and no waiver of privacy.

That the books may have been seen or indeed written by some employee of the partnership or its accountant in no way defeats the privilege. Where one's private documents would tend to incriminate him, the privilege exists although they were written by another person. *Boyd v. United States, supra; Wilson v. United States, supra.*

Moreover, as the Government has conceded in its Brief in Opposition to the Petition for Certiorari, the Fifth Amendment privilege is not limited to the sole proprietor and can protect two or more persons joined together in some form of association. If this be so, it follows that the physical possession of the books and records of such an association must reside at any one time in one of the associates, so as to allow him to assert the privilege. It is this type of purely personal capacity possession that Petitioner held here, and if this does not qualify for protection under the Fifth Amendment, nothing can.

ARGUMENT.

I. Introduction.

The Order of the District Court requires Petitioner to produce the books and records of his dissolved three-man law partnership which, during the period of winding up, were in his possession at the time the summons was issued (A. 116). The Court below correctly understood the issue to be whether Petitioner, as an individual partner, in lawful possession of these partnership records, could refuse to produce such records on the ground that such production would violate his Fifth Amendment rights (A. *15).

The importance of preserving inviolate the privilege against compulsory self-incrimination has often and recently been stated by this Court. *Couch v. United States*, 409 U. S. 322 (1973). In *Murphy v. Waterfront Commission*, 378 U. S. 52, 55 (1964), this Court set forth at length the policies and purposes of the privilege:

> ". . . our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government . . . in its contest with the individual to shoulder the entire load.' . . . our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.' . . ."

The essence of the privilege against self-incrimination is the protection of the individual from government com-

pulsion to testify against himself. Emphasis by this Court that the privilege is "a personal one" (*United States v. White*, 322 U. S. 694, 698-699 (1944)), "a *personal* privilege: [adhering] basically to the person, not to information which may incriminate him" (*Couch v. United States, supra*, at 328) means just this: that personal compulsion against an accused must be present, "coercion against a potentially accused person compelling [him], against [his] will, to utter self-condemning words or produce incriminating documents" (*Id.* at 329).

In the case at bar, the Petitioner is in possession of the sought after documents. The subpoena duces tecum is addressed to him. Thus, the ingredient of personal compulsion (the essential element found lacking in *Couch*), is obviously present here. Petitioner's Fifth Amendment claim thus must be respected, unless there is something significantly unique about the nature of the books and records of a small, closely held partnership to require a different result. We submit there is not.

A. Private Papers.

The development of the constitutional protection afforded books and records from compulsory production stems from *Boyd v. United States*, 116 U. S. 616 (1896), a case whose controlling Fifth Amendment authority has remained unimpaired and which has been characterized as "among the greatest constitutional decisions of this Court" (*Schmerber v. California*, 384 U. S. 757, 776 (1966) (dissenting opinion)), where this Court said at page 633

> "and we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

Boyd involved a charge that some 35 cases of plate glass had been imported to this Country from England by the firm of E. A. Boyd & Sons by means of a fraudulent or false invoice or other document and an Order of the District Court requiring the claimants of the goods to produce an invoice from the English seller showing the quantity and value of the glass contained in 29 of the cases.

Emphasis that "a man's private papers [cannot be used] to establish a criminal charge against him or to forfeit his private property" (*Boyd*, p. 622, 630), where the private paper was the invoice of the foreign shipper, has reference to the concept of "private property" only. This is carried over in the *White* case where it is observed that "the papers and effects which the privilege protects must be the private property of the person claiming the privilege. . . ." (p. 699).

Similarly, the observation in *Couch* (p. 330) that the *Boyd* production order was directed against the owner of the property who by responding would have been forced to "produce and authenticate any personal documents or effects that might incriminate him", again confirms that description of the books and records as "private" or "personal" refers to individually owned and possessed documents and not to the degree of privacy which attended the creation or maintenance of the records or upon the degree of intimacy of the information which they contain. See *United States v. Cohen*, 388 F. 2d 464, 471 (CA 9, 1967).

Thus, the facts that the books and records of the instant partnership, including the cash receipts and cash disbursements journal of the firm, may have been kept by one of the firm's employees who served as bookkeeper, that they reflected transactions in which each of the partners had a direct interest to the extent of his share of profits and losses of the firm and they were used by the firm's

accountant to prepare its partnership tax returns are equally applicable to the books and records of most sole proprietors. There has never been the requirement that the books must be maintained and kept personally by the person against whom the subpoena is issued. In fact, in *Wilson v. United States,* 221 U. S. 361, 378 (1911), Mr. Justice Hughes stated

> "It is at once apparent that the mere fact that the appellant himself wrote, or signed, the official letters copied into the books, neither conditioned nor enlarged his privilege. Where one's private documents would tend to incriminate him, the privilege exists although they were written by another person"

See also, *Schmerber v. California, supra.*

B. Private Enclave.

Tied-in with the concept of the possession of individually or privately owned books and records is the policy of the Fifth Amendment to protect

> "the right of each individual 'to a private enclave where he may lead a private life' . . ." (*Murphy v. Waterfront Commission, supra.*)

Here again the emphasis is not that the privilege is limited to documents prepared by the claimant himself or containing his own incriminating statements of fact. Instead, it is to the retention in himself of the privacy of his own records. Thus, as this Court observed in *Couch,* (p. 332) in explaining *Perlman v. United States,* 274 U. S. 7 (1918), where the Court held the privilege unavailable to a party seeking to suppress the admission of certain incriminating documents and exhibits before a Grand Jury, the movant's expectations of privacy in the exhibits had

been destroyed because he voluntarily had surrendered them as evidence in a patent infringement case he had earlier brought in the federal district court. The movant attempted unsuccessfully, where possession voluntarily had been delivered to another, to equate ownership with the scope of the privilege. But compulsion against the other does not invade the private enclave of the claimant.

On the other hand, in *Couch,* even after the taxpayer delivered the records to her accountant with no justifiable expectation of privacy, there can be no doubt that once the books and records had been returned to her, although the accountant could testify as to what he remembered they contained, a Fifth Amendment privilege against compulsory production would prevail had the government sought to subpoena them in the hands of the taxpayer.

In essence, we submit that neither the private papers nor the privacy aspect of the privilege can be used by the government in a backhanded way to support its claim that where a claimant expects that someone else may see his books and records (i.e. where a bookkeeper makes the entries or an accountant prepares tax returns therefrom), no Fifth Amendment privilege exists. Such a conclusion, as previously noted, would mean that the taxpayer would have to make his own entries and never let the books out of his sight in order to assert a right guaranteed to him by the Constitution. To merely state the argument serves to demolish it.

No matter how many times a defendant in a criminal case may have confessed guilt to others, he still cannot be compelled to be a witness against himself. Similarly, the fact that the books and records of a three-man law partnership may have been looked at by the partners or their accountant, does not mean that when they are safely in the rightful possession of one of the partners, the government can pry them open by subpoena.

C. Personal Capacity Possession.

This Court also observed in *Couch* (p. 330, n. 10)

> "A later court commenting on the *Boyd* privilege noted that 'the papers and effects which the privilege protects must be the private property of the person claiming the privilege *or at least in his possession in a purely personal capacity'. United States v. White,* 322 U. S. 694, 699 (1944)." (Emphasis added in *Couch.*)

As already noted, the term "private" has a dual meaning, but in the context of "papers", refers to individual ownership as opposed to the degree of privacy which attended the creation or maintenance of the particular records or the degree of intimacy of the information which they contain. Similarly, as noted in Part II, *infra,* the terms "personal" and "impersonal" present somewhat the same opportunity for varying meanings. In the context of the possessory nature which the claimant must have, however, it is submitted that the phrase "in a purely personal capacity" refers to papers rightfully held by a non-owner or a co-owner, but not in a "representative capacity" on behalf of a "collective group", and not by a "custodian" performing the "duties of his office" of whom it may fairly be said that "he does not own the records and has no legally cognizable interest in them". See *McPhaul v. United States,* 364 U. S. 372, 380 (1960); *Curcio v. United States,* 354 U. S. 118, 122-123 (1957); *Rogers v. United States,* 340 U. S. 367 (1951); *United States v. Fleischman,* 339 U. S. 349 (1950).

Custodians of organizational records may not frustrate the public policy underlying the organization's lack of privilege, as explained hereinafter, by withholding the organization's official records from examination by public

authorities under a claim of personal privilege. But the Fifth Amendment does not make ownership of subpoenaed documents absolutely essential to a claim of privilege. It is the possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit. *Couch v. United States, supra,* p. 333.

Accordingly, the *White* case recognizes that something more than "the private property of the person claiming the privilege" is protected, since the "private property" concept itself requires conjunction of possession and ownership, except in those possible areas referred to in notes 15 to 18 in *Couch,* where "constructive possession is so clear or the relinquishment of possession so temporary and insignificant as to leave the personal compulsion upon the accused substantially intact". The something more is the rightful possession even of a non-owner entitling him to assert the privilege, recognized as a viable proposition by the *Couch* citation in footnote 12 of the case of *United States v. Cohen,* 388 F. 2d 464, 468 (CA 9, 1967).

In *Cohen,* the accountant delivered his work papers to the taxpayer before the summons was issued against the taxpayer seeking the accountant's work papers, and the accountant was content to leave the papers in the possession of the taxpayer, not as custodian holding them for the accountant or as his representative subject to his command, but in a purely non-custodial or non-representative personal capacity, possessing papers owned by another.

In the case at bar, co-ownership and possession must be deemed in Petitioner. No one has a superior possessory or property right in the books and records. He holds them in no representative capacity and so long as the partnership records themselves are protected, government compulsion against the person of Petitioner must be denied.

D. Testimonial or Communicative Incrimination.

The potential incriminating character of the financial and business books and records of Petitioner's partnership, for income tax purposes, appears to be so obvious that the government has not suggested, nor did the Court below indicate, any reservation in this connection. As indicated at the hearing before the District Court (A. 65-66), the books could show records of receipts which Petitioner authorized to be included in the books but which the government may claim were never reported in his income tax returns. The records could disclose the source of funds received which the government may claim to be in violation of some federal law. Likewise, the failure of the books and records to contain a record of a receipt which the government may claim Petitioner in fact received in connection with his law partnership, may tend to support an allegation that it was omitted from his tax return. See Proposed Rules of Evidence for the United States District Courts and Magistrates, 1971 revised draft, Rule 803(7). Thus, the "testimonial or communicative nature" of the records is obvious. *Schmerber v. California, supra,* p. 761.

Further, the government agreed in *Hill v. Philpott,* 445 F. 2d 144 (CA 7, 1971), certiorari denied, 404 U. S. 991, referred to with approval in *Couch v. United States, supra,* p. 330, that the daily financial records of a taxpayer's legitimate business, consisting in most instances of a running account of charges and payments of clients and customers, although not reflecting thoughts, opinions, beliefs or predilections of their possessors, (*Cf. Stanford v. Texas,* 379 U. S. 476, 485 n. 16) are distinguishable from records of an illegal business such as gambling (*United States v. Hanon,* 428 F. 2d 101, 106-107 (CA 8, 1970), certiorari denied 402 U. S. 952; *Blank v. United States,* 459 F. 2d 383 (CA 6, 1972), certiorari denied 409 U. S. 887) and are protected

from compulsory production on Fifth Amendment grounds against an Internal Revenue Service summons.[3]

Although "the longstanding principle that 'the public . . . has a right to every man's evidence' . . . is particularly applicable to grand jury proceedings" (*Branzburg v. Hayes*, 408 U. S. 665, 682 (1972), "[t]he grand jury cannot require a witness to testify against himself. It cannot require the production by a person of private books and records that would incriminate him". *United States v. Dionisio*, 93 S. Ct. 764, 769-770 (1973) citing *Boyd v. United States, supra*, as the authority.

Accordingly, once it is established that the partnership books and records are covered by the Fifth Amendment privilege, the claim of Petitioner must be granted.

II. Books and Records of a Small Closely-Held Partnership Are Covered by the Fifth Amendment Privilege.

The Court below, in concluding that the Petitioner was not entitled to assert the Fifth Amendment personal priv-

3. It is important to note that in the Petition for Writ of Certiorari filed by the Government in *Philpott v. Hill*, No. 71-442, October Term, 1971, the Government even conceded that "Where the government proceeds by summons or subpoena, the taxpayer is necessarily required to testify against himself as a witness. Even when he is called upon to do no more than produce certain documents, 'he would be at any time liable to make oath to the authenticity or origin of the articles produced.' 8 Wigmore, *Evidence* (3d ed.). § 2264, p. 364. Such testimonial compulsion is specifically prohibited by the Fifth Amendment. See *Curcio v. United States*, 354 U. S. 118, 125.[10]

"[10] *Boyd v. United States, supra*, relied on by the court below, involved a subpoena issued to the accused personally; it therefore presented a most straightforward self-incrimination claim (116 U. S. at 638-641, Miller, J., concurring). Even if the object sought by subpoena in *Boyd* had been a weapon or contraband or fruits of a crime, the Fifth Amendment privilege against self-incrimination would have entitled the defendant to refuse to comply because in responding to the subpoena he would have to produce and authenticate the incriminating evidence. See *Curcio v. United States, supra*, 354 U. S. at 125; *United States v. White*, 322 U. S. 694, 698-699."

ilege with respect to the records of his three-man law firm in his lawful possession was (A. *15-16)

> "satisfied that it was not intended that the privilege was to apply to the possession of the books and records of an entity such as a partnership which has a recognized juridical existence apart from its members . . . despite the modest size of the partnership entity."

In so doing, it ignored the *Boyd* case which itself involved a subpoena [4] directed to a partnership for which a general partner was entitled to refuse to produce documents incriminating in content, and misread the functional teachings of *White* to justify automatic denial of the protection solely by reason of the separate legal identity of the partnership, despite the fact that with co-ownership and rightful, peaceful possession vested in Petitioner, enforcement of the subpoena would involve the prohibited government compulsion directly against his person. *Couch v. United States, supra.*

At the turn of the century, after the decision in *Boyd*, the compulsory production of papers by process became a live issue to be resolved mainly on Fifth Amendment grounds. *In re Mal Brothers Contracting Co.*, 444 F. 2d 615, 618 (CA 3, 1970). It was in this era that the "visitorial powers doctrine" was formulated to deny Fifth Amendment privilege to corporate records and to make the privilege inapplicable even if the production of the corporate records would tend to incriminate the custodial officer, and even if he were the sole stockholder of a dissolved corporation.

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4. *United States v. Dionisio, supra,* observed in footnote 10 that "While *Boyd* was concerned with a motion to produce invoices at a forfeiture trial, the Court treated it as the equivalent of a subpoena duces tecum and *Hale v. Henkel,* 201 U. S. 43, 76 applied *Boyd* in the context of a grand jury subpoena".

Thus, in *Hale v. Henkel,* 201 U. S. 43, 74-75 (1906), this Court noted that

> "The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to incriminate him. He owes no duty to the state since he received nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the state. . . ."

as compared to the corporation which

> "is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation which is charged with a criminal violation of the statute may plead the criminality of such corporation as a refusal to produce its books. To state

this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

"... Being subject to this dual sovereignty, the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress."

Wilson v. United States, 211 U. S. 361, 382 (1911) expressed the same thought in the following manner as to the status of books and papers of a private corporation:

"They are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection, or must be kept or filed in a special manner. They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production upon the ground of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by for-

feiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitorial power of the state, and in the authority of the national government where the corporate activities are in the domain subject to the powers of Congress."

Moreover, *Wilson* then extended the inapplicability of the Fifth Amendment privilege to the corporate records even if the production of those records would tend to incriminate the custodial officer. Thus, the Court said (p. 384-385):

"The appellant held the corporate books subject to the corporate duty. If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures. The reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a conclusion. . . . But the visitatorial power which exists with respect to the corporation of necessity reaches the corporate books, without regard to the conduct of the custodian.

"Nor is it an answer to say that in the present case the inquiry before the grand jury was not directed against the corporation itself. The appellant had no greater right to withhold the books by reason of the fact that the corporation was not charged with criminal abuses. . . . When the appellant himself became president of the corporation, and as such held and used its books for the transaction of its business committed to his

> charge, he was at all times subject to its direction, and the books continuously remained under its control. If another took his place, his custody would yield. He could assert no personal right to retain the corporate books against any demand of government which the corporation was bound to recognize."

Finally, in *Grant v. United States,* 227 U. S. 74 (1913), this Court extended *Wilson* to cover the case of documents even owned by the sole stockholder of a dissolved corporation.

Because of the Court's reliance in *Hale* and *Wilson* on the technical visitorial powers doctrine rather than on the government's legitimate need to regulate economically influential organizations, the question arose, to be presented in main part in *United States v. White, supra,* whether the privilege was applicable to all books and records, with the *Hale* and *Wilson* denial applicable only to papers of corporate entities or whether no books and records were protected except those personally owned and possessed by the individual claiming the privilege. See *United States v. Egenberg,* 443 F. 2d 512 (CA 3, 1971).

White involved a subpoena duces tecum addressed to "Local No. 542, International Union of Operating Engineers" to produce before the Grand Jury copies of its constitution and by-laws and specifically enumerated union records showing its collections of work permit fees, including the amounts paid therefor and the identity of the payors for a specified period (p. 695). A Mr. Jasper White appeared in response to the subpoena before the Grand Jury, describing himself as the assistant supervisor of the Union and admitted that he had the demanded documents in his possession but declined to produce them "upon the ground they might tend to incriminate Local Union 542,

International Union of Operating Engineers, myself as an officer therefor, or individually" (p. 696).

This Court, in holding that neither the union nor White as an individual officer could invoke the privilege of self-incrimination as the ground for refusing production of the Union's records emphasized a dual approach to the problem, ignored by the Court below.

White first recognized that (p. 699)

> "Since the privilege against self-incrimination is purely a personal one, it cannot be utilized by or on behalf of the organization, such as a corporation . . . . the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity . . . . individuals when acting as representatives of a collective group cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations . . . . the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers may tend to incriminate them personally . . . . such records and papers are not the private records of the individual members or officers of the organization."

This aspect of the test merely confirms what the Court held in *Hale, Wilson* and *Grant*. The privilege "applying only to natural individuals" (*White*, p. 698) is a personal privilege requiring compulsion against the person

of the witness in possession of the books and records. *Couch v. United States, supra.* It cannot be utilized by or on behalf of any organization such as a corporation which the state charters and over which it has visitorial powers (*Hale, Wilson*), regardless of the size of the organization, and thus is inapplicable even to the solely owned corporation. *Grant.*

Thus, when the documents are held by a custodian in a representative capacity, the size or character of the corporate or other entity that he represents is immaterial. It is in these circumstances that the size and nature of the business entity is to be ignored.

Disregard of the size of the membership and scope of the activities in the solely owned corporation situation is not unduly restrictive or opposed to Petitioner's position. The proprietor has the voluntary choice to operate his business in the unincorporated proprietorship form or use the corporate entity. A part of the price which he has to pay for the corporate advantage voluntarily chosen is vulnerability to production of incriminating corporate documents. *Cf. Moline Products, Inc. v. Commissioner,* 319 U. S. 436 (1943).

On the other hand, the three-man law firm in which Petitioner was a member had the choice to engage in the practice of law as a professional corporation or as a partnership, but the members could not be associated to practice their profession as co-owners for mutual benefit and profit as individual practitioners.

Hence, the test cannot mean, as the Court below construed it, that whenever more than one person is involved in some joint enterprise, the enterprise constitutes an organization separate and apart from the individuals so that the records are always held by a member in a representative capacity and never subject to a claim of privilege.

The fallacy in this approach is evidenced by the second aspect of the test set forth in *White* which plainly recognizes that the privilege is not limited solely to the individual or sole proprietor but can be claimed on behalf of a certain type of collective group of natural persons, with the privilege denied where (p. 701)

> "one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity."

Recognizing that the visitorial powers doctrine could not apply to a labor union since it was a non-corporate association, this Court described visitorial powers as a convenient vehicle to justify a necessary government power of inspection, equating it with the government's legitimate need also to regulate economically influential associations (p. 700).

It should now be observed that the elements of "personal privacy" (p. 700), "purely private or personal interests of its constituents" and the "impersonal" character in the scope of the organization's membership and activities are cast in a completely different light from the concepts of "private papers" (private property) of the person claiming the privilege or the purely "personal" capacity of the possession. As previously pointed out, the latter use refers to the records held by the claimant as his own private property or in a non-custodial or non-representative capacity, such as was present in *United States v. Cohen, supra,* and

United States v. Judson, 322 F. 2d 460 (CA 9, 1963), also cited with approval in *Couch v. United States, supra* (p. 330), as involving an instance where possession and ownership are deemed conjoined, although *Judson* involved an attorney successfully making a Fifth Amendment claim on behalf of his client against the compulsory production of his client's books and records in the possession of the attorney.

On the other hand, the functional test of the nature of the organization does embrace a degree of privacy which attends the inspection and disclosure of the records, a degree of intimacy of the information they contain and a field of common endeavor embodying substantially identical (personal) interests of each of the members.

> ". . . the essence of the test, consistent with the privilege's original concern for individual protection, denies the privilege to associations whose interests are predominantly collective. Clearly entitled to assert the privilege under this test are small informal organizations whose members, within the field of common endeavor, have interests identical with those of each other member. To the extent that the membership and scope of group activities enlarge, the area of group purpose common to all members inevitably narrows. The aggregate of group aims no longer coincides with the aims of any member individually, and the group assumes a personality of its own. If a few persons, discharged from employment because of their race, organize to regain their jobs by publicizing their plight, their association embodies their personal interests only. As the membership expands and begins to promote civil rights generally, however, the association at some point loses its personal attributes, and the members become guided by group goals. The development of independent group

identity disqualifies the association from claiming a self-incrimination privilege under the *White* formulation."[5]

Structurally and functionally the instant three-man law partnership did not involve more than the private or personal interests of its members and in no way represented organized institutional activity. Under the Uniform Partnership Act, in effect in Pennsylvania,[6] the partnership's existence depended in no way on state charter, but unlike the corporation, was dependent upon the life of each of the partners.[7] The membership was limited to the chosen three; no new member could join the firm without unanimous consent;[8] it handled only those legal matters which the partners determined, with each of the partners having full authority to bind the partnership in the conduct of the partnership affairs.[9] More important, the partnership books and records, in their creation, maintenance and intimacy were no more distinct from the individually owned books and records of the partners than would be true if each were practicing law as a sole practitioner, having a secretary or bookkeeper keep the entries and having his accountant prepare his tax returns from the information therein contained, with good accounting and business procedures allowing to pass through the sole practitioner's business bank account, expenses which are broken down into business and personal, with personal expenses charged to the proprietor's personal account.

5. H. Robert Fiebach, Constitutional Rights of Associations to Assert The Privilege Against Self-Incrimination, 112 U. of Pa. Law Review 394 (Note).

6. 59 Purdon Pa. Stat. § 1.

7. Ibid. § 93.

8. Ibid. § 51.

9. Ibid. § 31.

Similarly, in the instant case, the nature of the small law firm as a common enterprise and the identity of the limited number of interests of the law partners engaged in practicing their profession, with the books properly recording such items as restaurant charges and country club dues containing elements of both partnership business and individual personal expenses (A. 92-93) and with the right in each of the three partners, but in no others, to inspect the books of accounts, embodies and represents the private and personal interests of each of the members with which each was intimately concerned and involves no waiver of privacy.

In the 30 odd years since *White* denied the privilege to the records of a labor union, this notion of size, impersonality and other circumstances have all been involved in the cases reaching this Court for decision as to the extent to which Fifth Amendment rights may be asserted with respect to business documents which might incriminate a member of an unincorporated association. Thus, although this Court has seemed to stress the question of whether the papers are held in a "representative capacity" on behalf of a "collective group" by a "custodian" performing the "duties of his office" of whom it may fairly be said that "he does not own the records and has no legally cognizable interest in them" (*McPhaul v. United States,* 364 U. S. 372, 380 (1960) (concerned with the Civil Rights Congress); *Curcio v. United States,* 354 U. S. 118, 122-123 (1957) (Labor Union); *Rogers v. United States,* 340 U. S. 367 (1951) (Communist Party); *United States v. Fleischman,* 339 U. S. 349 (1950) (Joint Anti-Fascist Refugee Committee)), the impersonal nature of each organization involved made it clear that no Fifth Amendment privilege pertained to the books and records themselves and the issues before the Court in no way involved the question of whether the

books and records were themselves protected, but rather whether the witness had to explain where they were (*Curcio, Rogers*) or whether he was in possession of them at the time the subpoena to produce was served (*McPhaul, Fleischman*).[10]

In *White*, this Court, had it wanted to, could easily have stated that when more than one person engages in a joint enterprise, the privilege is lost and is allowed only for the sole proprietor. That this Court contemplated that people could associate as partners or jointly with others in a common enterprise and still have the protection of the Fifth Amendment privilege is evident from the use of the plural "constituents" in the impersonality test set forth above, when the Court said that

> "a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely personal interests of its *constituents*, but rather to embody their common or group interests only." (Emphasis supplied.)

By the use of the plural instead of the singular, this Court did and intended to indicate that small organizations such as the intimate association of members of a small law firm continue to embody and represent the purely private

10. Accepting the concession of the government referred to in footnote 3 that compulsory production of books and records pursuant to a subpoena constitutes an incriminating admission of their identity and authenticity, which apparently was what this Court had in mind when it stated in *Schmerber v. California, supra*, p. 763-764:

> "It is clear that the protection of the privilege reaches an accused's communications, whatever form they may take, and the compulsion of responsives which are also communications, for example, compliance with a subpoena to produce one's papers."

it would seem that the government would be hard put to demonstrate why even a custodial officer holding corporate books and records in a representative capacity would now not be covered by the privilege.

or personal interests of the constituents rather than the common or group interests only.[11]

The government, in its Brief in Opposition to the Petition for Certiorari, does recognize (p. 6) that the Fifth Amendment privilege is not limited to the sole proprietor, and can protect two or more persons joined together in some form of association, but suggests that the *White*

11. A number of District Court cases have faced the question of whether books and records of a small, closely held partnership are "outside the private domain walled by the Fifth Amendment" (A. *5) and have divided on the issue, with only two cases in the Courts of Appeals, both of which easily met the impersonality test of the large enterprise of *White*, discussing the problem. In the District Court, compare *United States v. Cogan*, 257 F. Supp. 170 (S. D. N. Y., 1966); *United States v. Slutsky*, 73-1 U. S. T. C. § 9186 (S. D. N. Y., 1972); *United States v. Lawn*, 115 F. Supp. 74 (S. D. N. Y., 1953); *Subpoena Duces Tecum*, 81 F. Supp. 418 (N. D. Calif., 1948); *United States v. Linen Service Council*, 141 F. Supp. 511 (D. N. J., 1956); *United States v. Brazely*, 268 Fed. 59 (W. D. Pa., 1920) holding the books and records of the small personal partnership to be within the protection of the Fifth Amendment, with *United States v. Garrison*, 348 F. Supp. 1112, 1126 (E. D. La. 1972); *United States v. Bally Manufacturing Co.*, 345 F. Supp. 410, 431 (E. D. La. 1972); *United States v. Onassis*, 125 F. Supp. 190 (D. D. C. 1954); *United States v. Onassis*, 133 F. Supp. 327 (S. D. N. Y., 1955); *United States v. Quick*, 336 F. Supp. 744 (S. D. N. Y., 1972); *In Re Grand Jury Subpoena Duces Tecum*, (D. Md., Civil No. 72-292-B, April 23, 1973) holding that they are not.

The Courts of Appeals cases are *In Re Mal Brothers Contracting Co.*, 444 F. 2d 615 (CA 3, 1971) and *United States v. Silverstein*, 314 F. 2d 789 (CA 2, 1963). In *Mal Brothers*, the entity employed 200-250 persons a year, with an annual payroll in excess of $1,000,000 and receipts in excess of $2,000,000 a year, excluding joint ventures with other companies, owned equipment of approximately $1,000,000, with none of the partners being engineers or familiar with the accounting and bookkeeping end of the business. *Silverstein* involved a general partner of five limited partnerships having limited partners numbering from about 25 to 147 and a capitalization of upwards five million dollars, with the managerial general partner working with other peoples' money under defined delegations of authority and responsibility. In addition, the case of *United States v. Warnes*, 157 F. 2d 797 (CA 5, 1946), cited in *Silverstein*, involved a subpoena issued to an officer of various corporate and unincorporated organizations, with the Fifth Amendment privilege denied without any meaningful discussion as to the nature of the organizations.

formulation meant to protect organizations such as family units where personal interests predominate.

Neither *White,* nor any other formulation by this Court draws any significance to the family partnership as distinguished from other closely held, intimately connected partnerships. Involved in this type of case are business books and records. There is no reason why the relationship of a small group of law partners may not be as intimate and personal in their profession as the father and son or brother and sister partnership. See *United States v. White,* 137 F. 2d 24, 26-28 (dissenting opinion) (CA 3, 1943).

It is submitted, therefore, that the *White* case does supply the answer to the question posed by Mr. Justice McKenna dissenting in *Wilson,* where he asks at page 388

> "And what of partnership property, or property otherwise owned in common? Does the degree of interest affect the rule?"

The short answer must be that the business, tax and financial books and records of the small law firm in this case are as protected from compulsory production under a Fifth Amendment claim as are the similar records of the individual proprietor. Although they might not be the "private property" of Petitioner, they are at least in his possession "in a purely personal capacity" (i.e. not as custodian or representative of the firm) to the extent this is legally and factually possible, as co-owner in rightful, lawful possession.

Once it is accepted, as the government concedes, that there exists some form of association which does not lose the protection of the Fifth Amendment, physical possession of its books and records has to reside at any one time in one of the associates, to enable the necessary compulsion to be worked against him. Thus, each of the partners must be

permitted to assert a Fifth Amendment claim regarding actual testimony about the books (*Curcio v. United States*, 354 U. S. 118, 125 (1957)) and the partner in possession, in addition, must be permitted to refuse to deliver the actual books. Petitioner is the possessing partner and the type of possession held by him in this case must qualify for protection or nothing can.[12]

CONCLUSION.

The books and records of the small, closely held three-man law partnership sought by the federal grand jury subpoena duces tecum fall within the protection from compulsory disclosure under the Fifth Amendment privilege against self-incrimination. They are in the rightful and peaceful possession of Petitioner, disclosure of their contents may tend to incriminate him and response to the subpoena is governmental compulsion directed against himself. The judgment of the Court of Appeals ordering production of the books and records should, therefore, be reversed.

Respectfully submitted,

LEONARD SARNER,
LOUIS LIPSCHITZ,
Counsel for Petitioner.

12. Although the partnership was dissolved, it was still in the process of being wound up (A. *15) at the time the Grand Jury Subpoena was served on Petitioner. Petitioner does not contend that the dissolution of the partnership gave him a greater privilege with respect to the partnership records than existed during the operation of the partnership. This has been rejected in the corporate field. See *Curcio v. United States, supra* p. 122. Likewise, no suggestion is made that the dissolution takes away any privileges which may exist in the books and records by virtue of the fact that the winding up of the firm is continuing rather than the firm continuing on a current basis.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-190

ISADORE H. BELLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (Pet. App. A1–A10)[1] is not officially reported. The opinion of the court of appeals (Pet. App. A13–A16) is reported at 483 F. 2d 961.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1973 (Pet. App. A17; A. A4). A petition for rehearing was denied on July 20, 1973 (Pet. App. A18; A. A4). The petition for a writ of certiorari was filed on July 27, 1973, and was granted on October 15,

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari; "A." references are to the separately bound record appendix.

1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a former partner in a dissolved law partnership is entitled to invoke the Fifth Amendment privilege against self-incrimination as a ground for refusing to comply with a grand jury subpoena to produce business records maintained by the partnership while he was a member, where the records had come into his possession after the dissolution.

CONSTITUTIONAL PROVISION INVOLVED

The pertinent portion of the Fifth Amendment of the United States Constitution states:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

On May 1, 1973, a federal grand jury subpoena (A. A6) was served upon petitioner, directing him to appear and testify and to bring with him "all partnership records currently in your possession for the partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969." Petitioner appeared before the grand jury on May 9, 1973 (A. A8), but refused to produce the requested documents, on the ground that under "the First, Fourth, Fifth, and Sixth amendments * * * I can not be compelled to be a witness against myself, and the books and records may contain private, testimonial and personal statements and information which might be considered as so doing"

(A. A9).[2] For the same reason he also refused to state whether he had the documents called for by the subpoena (A. A10).

The government thereupon proceeded in the district court to enforce the subpoena (A. A30–A31). The evidentiary hearing in the district court established that in 1968 and 1969 petitioner was the senior partner and 45 percent interest owner in Bellis, Kolsby & Wolf, a three-partner law firm located in Philadelphia, Pennsylvania. The partnership was formed in 1955 or 1956 and consisted of three attorneys who were partners, one attorney who was an employee, three or four secretaries, and a young man who did the firm's "City Hall work" (A. A82–A83, A87, A89). Petitioner's secretary, Harriet Lipman, whom he periodically supervised, served as the partnership's office manager and bookkeeeper (A. A82, A83). As bookkeeper, she made the entries for the partnership's receipts and disbursements, wrote checks on a regular account under the partnership name "Bellis, Kolsby and Wolf," and performed other duties under the supervision of William Blumberg, the firm's outside accountant (A. A83, A91, A93). She also made entries for the personal transactions and expenses of the individual partners, which were sometimes reflected in the partnership books (A. A83–A84).[3] Petitioner,

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[2] Following his initial appearance before the grand Jury, petitioner relied solely upon the Fifth Amendment privilege against self-incrimination (see, *e.g.*, A. A22–A28, A63–A76, A108–A114).

[3] On occasion, Mrs. Lipman was told to pay country club and restaurant bills with partnership checks (A. A92–A93). The bills usually itemized personal and business expenses; the

the two other partners, Mrs. Lipman, and Mr. Blumberg and his staff all had access to the partnership books and records (A. A91).[4]

In late 1969 or early 1970, the partnership was dissolved,[5] and petitioner and Mrs. Lipman left its premises (A. A84, A95). Petitioner joined another law firm and Kolsby and Wolf continued in business together at the same premises (A. A12). The business records of the dissolved partnership had always been kept in petitioner's room (A. A85). When the partnership was dissolved, Mrs. Lipman asked petitioner whether they should take the records with them. That was not done because, as Mrs. Lipman stated, "we had such limited space [in petitioner's new quarters] we didn't know what we were going to do so we decided to leave them" in the old office (A. A84–A85). After petitioner left the old office, the records were located in a room occupied by Kolsby (A. A87).

Thereafter, Mrs. Lipman would often telephone petitioner's former partners and ask them to look up certain things for her in the records. From time to

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personal expenses would be charged to the drawing account of the particular partner involved (A. A92–A94).

[4] Blumberg, the outside accountant, prepared the partnership tax returns and also performed audits (A. A94, A101).

[5] From the date of the dissolution to the close of the evidentiary hearing, petitioner and his former partners continued to settle cases of their former partnership and remitted to each other the appropriate portion of the funds involved (A. A87–A88, A98). Petitioner states (Br. 3) that the Bellis, Kolsby & Wolf partnership is still in the process of being wound up.

time, at petitioner's request, she would also go to the old office to get information from the records or to bring back files which petitioner needed (A. A85, A95–A96). Kolsby and Wolf knew that she was taking the records, as did Mr. Kolsby's secretary and also the bookkeeper of the new partnership (A. A86–A87). On one occasion she informed Mr. Kolsby that she was taking the records; she did not tell him that she was not going to return them, and he did not ask her whether they would be returned (A. A87, A97–A98).

In late February or early March of 1973, petitioner or Mr. Lipschitz, one of his attorneys in this case, instructed Mrs. Lipman to bring to petitioner's office the records involved in this proceeding (A. A86). After telephoning Mr. Kolsby's secretary, Mrs. Lipman "took what [she] could carry" from the old office (A. A86), completing the removal of the records in four or five trips over approximately one week (A. A98). The records removed at that time probably included the firm's cash receipts and accounts receivable ledgers for 1968 and 1969 (A. A92, A98–A100). The accounts receivable ledger recorded fees due from insurance companies and from retainer clients for services rendered by the partnership (A. A100–A101).

During April 1973, Kolsby and Wolf gave their permission for the grand jury to examine the partnership records of Bellis, Kolsby & Wolf for 1968 and 1969. However, when they discovered that these records had been removed from their office in late

February or early March 1973, they made an unavailing demand on petitioner to return the records (A. A13).[6]

The district court ordered compliance with the grand jury subpoena, specifically directing that petitioner "turn over any cash receipt books, cash disbursement books or books of records and accounts of the partnership for the years in question." It expressly excluded, however, any confidential client files from the scope of its order (A. A116). On "the premise that the [Fifth Amendment] privilege is entirely personal" (Pet. App. A7), the district court held that "the records in this case are beyond the pale of the personal privilege" (*ibid.*) because (A. A116)—

> the cash receipt books, cash disbursement books, or any books and records showing the financial situation of the partnership * * * are records of the partnership, they are under the partnership law of Pennsylvania subject to any agreements between the partners to be

[6] These facts were alleged in a memorandum in support of the government's motion to compel the production of the partnership records (A. A13) and were not denied in petitioner's memorandum supporting his motion to quash the subpoena (A. A24–A28). At the evidentiary hearing on May 10, 1973 (A. A62), the government moved for permission to disclose Kolsby's testimony to the grand jury under Rule 6(e) of the Federal Rules of Criminal Procedure (A. A102). The district court denied the motion, indicating, however, that Kolsby could be called as a witness (A. A103). The government stated that it saw no need to do so at that time and that it was prepared to argue petitioner's motion to quash the subpoena (A. A104).

> kept at the principal place of the partnership and every partner shall at all times have access to and may inspect and copy any of them and, therefore * * * they are not the personal records of any one particular partner * * *.

On May 16, 1973, petitioner reappeared before the grand jury and again refused to produce the subpoenaed documents (A. A123–A125). The district court held him in civil contempt (Pet. App. All; A. A130). Petitioner was released on his own recognizance pending appeal (A. A2, A130–A131). The court of appeals affirmed. It held that requiring petitioner to comply with the subpoena involved no violation of his Fifth Amendment privilege against self-incrimination since "the privilege has always been regarded as personal in the sense that it applies only to an individual's words or personal papers" and "was not intended * * * to apply to the possession of records of an entity such as a partnership which has a recognizable juridical existence apart from its members" (Pet. App. A15–A16).[7]

SUMMARY OF ARGUMENT

As the Court reaffirmed last Term in *Couch* v. *United States,* 409 U.S. 322, the Fifth Amendment privilege against self-incrimination is an intimate and

[7] The court of appeals denied petitioner's motion to stay issuance of the mandate and directed issuance thereof on August 1, 1973 (A. A4–A5). On that date, Mr. Justice White stayed issuance of the mandate pending final disposition of the case by this Court (A. A5).

personal right. While the Court has extended it to cover books and records, it has made clear that only personal records are eligible for the claim. The Court has repeatedly rejected the claim of the privilege by a corporate officer with respect to the books and records of the corporation even if they incriminate the officer personally. The basis of these decisions is that the officer's possessory interest in the records is merely that of a custodian on behalf of the corporation, rather than personal dominion.

In *United States* v. *White,* 322 U.S. 694, the Court extended the rationale of its decisions respecting books and records of a corporation to those of an unincorporated association. It concluded that a member of such an association holding the books and records of the organization in a representative, rather than a personal, capacity could not invoke the privilege. In so holding, the Court noted the essential similarity in nature and function between corporations and many unincorporated associations. It drew the analogy between a shareholder's right to inspect the books and records of his corporation and a member's right to gain access to his association's records. As a result, such records do not contain the requisite element of personal privacy to which the privilege against self-incrimination can attach.

In announcing a test of general application, the Court in *White* stated that the privilege did not apply to those organizations which were so impersonal "in the scope of its membership and activities that it cannot be said to embody or represent the purely

private or personal interests of its constituents, but rather to embody their common or group interests only." 322 U.S. at 701. Petitioner urges that under this test the records of a three-partner law firm are protected by the privilege. The Court's formulation, however, cannot be reduced to a simple proposition based upon the size of the organization, since it refers to the *scope* of membership *and* activities.

The legal attributes of a business or professional partnership give it an independent group identity which differs significantly from the personal interests of its members. Confidential communications between partners are not privileged from compelled disclosure, and all members of the partnership have a legal right of access to the partnership's books and records. A partnership, therefore, is not "a private enclave" in which each member is legally entitled to "lead a private life * * *" (*Murphy* v. *Waterfront Commission,* 378 U.S. 52, 55). It follows that, like the custodian of other associational or of corporate records, the custodian of partnership records is not entitled to invoke the privilege against self-incrimination as a bar to their production.

Moreover, here, despite the fact that the persons who had a financial interest in petitioner's partnership were few in number, the record demonstates that the association maintained an independent group identity. The partnership held itself out as such to third parties and was continuously engaged in the active practice of law for almost 15 years until its dissolution. In addition to its three partners, the firm had one attorney-employee and five other employees.

In addition, petitioner's conduct with respect to the particular records at issue was so casual as to be hardly consistent with his claim of personal privacy in them. Not only did he freely permit his partners, his secretary, and his accountant and the accountant's staff to gain access to the records, he also left them with his former partners for more than three years after he departed from their offices. He removed them only shortly before the issuance of the grand jury subpoena, and had he not removed them his partners would have voluntarily turned them over to the grand jury. In these circumstances it would be especially inappropriate to permit petitioner to raise the bar of the privilege simply on account of his physical possession of the records. Petitioner's possession was correctly deemed to be in a representative capacity on behalf of the partnership. His claim of the privilege was therefore properly rejected by both courts below.

The decision below is further supported by both the Uniform Partnership Act, applicable in virtually every state, and the partnership provisions of the Internal Revenue Code. Under both of these statutory systems, partnerships are treated as independent legal entities for many significant purposes. Thus, the decision below comports with modern realities of the law of partnerships, as well as with this Court's Fifth Amendment jurisprudence.

ARGUMENT

A FORMER PARTNER OF A DISSOLVED PARTNERSHIP MAY NOT INVOKE THE PRIVILEGE AGAINST SELF-INCRIMINATION AS A GROUND FOR REFUSING TO PRODUCE PARTNERSHIP BUSINESS BOOKS AND RECORDS IN HIS POSSESSION

A. THE PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT APPLY TO POSSESSORY INTERESTS IN BOOKS AND RECORDS WHICH ARE NOT HELD IN A PURELY PERSONAL CAPACITY

1. In this case, the district court ordered petitioner, pursuant to a grand jury subpoena, to produce certain of the dissolved partnership's books and records which were in his possession. In response, he contends that the order violates his Fifth Amendment privilege not to "be compelled * * * to be a witness against himself." In order for that claim to prevail, however, petitioner must show that the partnership books and records were his "private property" or at least held by him "in a purely personal capacity." *United States* v. *White*, 322 U.S. 694, 699.

The books and records in question, we submit, do not fit within either category. They were plainly not petitioner's private property, for his other partners had equal rights in and access to them and exercised those rights until petitioner physically took the books and records away from them. Moreover, despite petitioner's attempts to subject the books and records to his exclusive dominion and control, he did not hold them in a purely personal capacity. To the contrary, he held them in his

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capacity as a partner, a representative of the partnership, the business transactions of which were reflected upon the books and records at issue. Thus, their production will not encroach upon petitioner's purely private and personal interests which are alone protected by the privilege against self-incrimination.

2. As this Court observed last Term in *Couch* v. *United States,* 409 U.S. 322, 327, with respect to the Fifth Amendment privilege against self-incrimination:

> By its very nature, the privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation. Historically, the privilege sprang from an abhorrence of governmental assault against the single individual accused of crime and the temptation on the part of the State to resort to the expedient of compelling incriminating evidence from one's own mouth.

Although the Fifth Amendment's privilege against compulsory self-incrimination was arguably meant to do no more than confer a testimonial privilege upon a witness in a judicial proceeding, this Court in *Boyd* v. *United States,* 116 U.S. 616, held that a person could not be compelled to produce his private written statements in his possession that might tend to incriminate him.[8]

[8] This result has been criticized in Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change,* 37 U.Cin.L.Rev. 671, 701–703 (1968). The author argues that the production of documents, as contrasted with oral testimony, ought not to be protected by the privilege against self-incrimi-

Three elements were present in *Boyd* to support the claim of privilege: (1) the papers were within the personal possession of the person claiming the privilege; (2) they were the private property of that person (see n. 11, *infra*); and (3) if produced, the papers might tend to incriminate him. All three of these elements must exist for the privilege to be applicable. Thus, for example, if B is in possession of A's records and if the production of these records will incriminate both A and B, neither party can assert the privilege with respect to the books. A, while he can assert ownership and self-incrimination, is not protected by the privilege because he is not in possession of the records. This is the teaching of *Couch* v. *United States, supra,* where the Court held that where the owner of books and records transferred them to an accountant, she could not invoke the privilege as a bar to the production of the records by the accountant. In these circumstances, the Court concluded, "the ingredient of personal compulsion against an accused is lacking" (409 U.S. at 329).[9]

Returning to the example, the privilege is similarly not available to B. While B can assert physical possession and self-incrimination, he cannot assert ownership of the records. His possession is therefore

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nation. See also *Grosso* v. *United States*, 390 U.S. 62, 76–77 (Stewart, J., concurring).

[9] The example is not intended to extend to "situations * * * where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact." *Couch*, *supra*, 409 U.S. at 333. See, also, *id.* at 337 (Brennan, J., concurring).

custodial rather than personal. The present case is a variation of this part of the example in the context of a partnership. Under analogous circumstances, the Court has rejected claims of the privilege against self-incrimination. For example, in *Wilson* v. *United States,* 221 U.S. 361, it held that a corporate officer holding corporate books in his custody could not decline to produce them pursuant to a subpoena duces tecum. In accordance with the fundamental premise that the privilege against self-incrimination is personal in nature, the Court in *Wilson* held the privilege unavailable because the books were corporate records maintained by the claimant in his capacity as an officer of the corporation rather than his private papers as in *Boyd.*

This Court has recognized that the significant aspect of *Boyd* was that the documents in question were the private papers of the person claiming the privilege,[10]

[10] The order to produce in *Boyd* was in fact issued to E. A. Boyd & Sons, a partnership. But contrary to petitioner's contention (Br. 17), *Boyd* is not authority for the proposition that partnership records, as such, are subject to the privilege against self-incrimination. The question whether the invoice at issue in *Boyd* was a private business record was not raised. It was treated as private by the parties (with the government arguing instead that the privilege did not apply to *in rem* proceedings, see *Shapiro* v. *United States*, 335 U.S. 1, 33 n. 42), and the Court therefore decided the case on the premise that it involved "compulsory production of a man's private papers * * *." 116 U.S. at 622; see *id.* at 630, 633. Thus, in extracting the essential passage from the *Boyd* opinion which was descriptive of its holding, the Court in *Couch* cited *Boyd* as deciding that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" (116 U.S. at 630) would violate the Fourth and Fifth

and thus were held by him in a personal capacity. As the Court noted in *Couch* v. *United States, supra,* "A later Court commenting on the *Boyd* privilege noted that 'the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or *at least in his possession in a purely personal capacity.' United States* v. *White,* 322 U.S. 694, 699 (1944) (Emphasis added.)" (409 U.S. at 330, n. 10).

Here, petitioner is holding the partnership's books and records subject to fiduciary obligations to the other partners who are their co-owners and have a legal right of access to them.[11] The mere fact that petitioner, as one of the partners, is also a co-owner of the partnership books and records, therefore, does not mean that he is holding them in the requisite personal capacity to entitle him to invoke the privilege. His possession lacks the right to exclude others that is the characteristic attribute of "a private enclave where he may lead a private life * * *" (*Murphy* v. *Waterfront Commission,* 378 U.S. 52, 55), and is instead essentially representative in nature. These are *the partnership's* books and records, rather than his own personal, private papers. Accordingly, petitioner, as their custodian, is not privileged to refuse to produce them unless the nature of the partnership's associational relationship warrants extension of the privilege

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Amendments. See 409 U.S. at 330. See also *Wilson* v. *United States,* 221 U.S. 361, 380; *United States* v. *Onassis,* 125 F. Supp. 190, 208 (D. D.C.).

[11] See p. 23, *infra.*

beyond its established personal bounds. That is the question to which we now turn.

B. THE PRIVILEGE AGAINST SELF-INCRIMINATION IS PERSONAL IN NATURE AND DOES NOT EXTEND TO THE BOOKS AND RECORDS OF CORPORATIONS, PARTNERSHIPS AND OTHER UNINCORPORATED ASSOCIATIONS HELD BY REPRESENTATIVES OF SUCH ENTITIES

1. In *Hale* v. *Henkel,* 201 U.S. 43, the Court held that the Fifth Amendment privilege against self-incrimination does not protect a corporation against the production of its records pursuant to a grand jury subpoena. The principal ground of the decision was the distinction between an individual who, as a natural person, is protected by the privilege, and a corporation which is not so protected. See *Campbell Painting Corp.* v. *Reid,* 392 U.S. 286, 288–289. In drawing this distinction the Court stated that an individual "may stand upon his constitutional rights as a citizen," is "entitled to carry on his private business in his own way," and "owes no duty to the State or to his neighbors to divulge his business." 201 U.S. at 74. On the other hand, the Court viewed a corporation as "a creature of the State * * * presumed to be incorporated for the benefit of the public" and the recipient of "certain special privileges and franchises" held "subject to the laws of the State and the limitations of its charter." Accordingly, the legislature was deemed to have "a reserved right * * * to investigate its contracts and find out whether it has exceeded its powers," and that right extended not only to the state of incorporation but also to the federal government for

purposes of "indication of its own laws." 201 U.S. at 74–75.

Similarly, in *Wilson* v. *United States, supra,* the distinction between an individual and a corporation was a principal focus of the Court's holding that a corporate officer summoned to produce corporate records could not invoke his personal privilege against self-incrimination because he held the records in his custodial rather than in a personal capacity.[12] In the Court's view, the *Boyd* decision did not support the officer's claim of privilege because in that case "the fact that the papers involved were the *private* papers of the claimant was constantly emphasized" (221 U.S. at 380) (emphasis in original). Instead, the Court held (221 U.S. at 381–382):

> The fundamental ground of decision in this class of cases, is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection.

Accordingly, the Court has refused to extend the privilege to documents which are essentially corporate or organizational in nature, notwithstanding claims

[12] *Hale* v. *Henkel, supra,* had left this question unanswered. The person summoned to produce the records in that case was in no danger of incrimination because he had been granted statutory immunity. See 201 U.S. at 66–69.

by individuals to legal title of the documents involved. Thus, in *Wheeler* v. *United States,* 226 U.S. 478, 482–483, and *Grant* v. *United States,* 227 U.S. 74, 76–77, where the corporations had been dissolved by the time the subpoenas had been served and individual shareholders asserted ownership rights in the documents sought,[13] the Court nevertheless rejected their claims of privilege. It held that the documents retained their "essential character" as corporate documents (226 U.S. at 490; 227 U.S. at 80) and "were still impressed with the incidents attending corporate documents" (226 U.S. at 490), and thus did not qualify as private papers even though the individuals then in possession (or constructive possession, in *Grant*) of them also claimed, and were assumed by the Court, to be their owners (226 U.S. at 490, 227 U.S. at 80).[14]

2. *a.* Although the *Hale, Wilson, Wheeler,* and *Grant* decisions had established the distinction for Fifth Amendment purposes between the papers of natural persons and those of artificial entities, they had all involved books and records of corporations. In *United States* v. *White,* 322 U.S. 694, the Court extended the rationale of those decisions to the books and records of unincorporated associations. There, the Court rejected a claim by an officer of a labor union that he was privileged on self-incrimination

[13] In *Grant*, the subpoena was served on the attorney for the corporation's sole stockholder. See 227 U.S. at 76–77.

[14] Petitioner therefore errs in arguing (Br. 10) that the characterization of documents as "private" or "personal" for Fifth Amendment purposes depends entirely on whether they are individually owned and possessed, without reference to the degree of privacy attending their creation or maintenance.

grounds to refuse to produce the union's records. In so holding, the Court stated that "the records of any organization, whether it be incorporated or not," are not covered by the privilege against self-incrimination, the scope of which is "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records" (322 U.S. at 700–701).[15]

In making the transition from a corporation to an unincorporated association, the Court in *White* continued to distinguish between books and records owned by an individual or held by him in a personal capacity for which the privilege is available and those held in a custodial capacity which are not protected by the privilege. With respect to association records held by individuals as custodians, the Court noted (322 U.S. at 699–700) that such records are "[u]sually, if not always, * * * open to inspection by the members" of the association and that "on appropriate occasions" this right of inspection is legally enforceable.[16] Such association records, therefore, con-

[15] The Court specifically denied that the visitorial powers doctrine applicable to corporations was of controlling significance, describing it as merely "a convenient vehicle for justification of governmental investigation of corporate books and records," the absence of which does not "confer upon * * * an organization the purely personal privilege against self-incrimination" (322 U.S. at 700).

[16] Significantly, the Court's discussion refers (322 U.S. at 700) to its prior decision in *Guthrie* v. *Harkness*, 199 U.S. 148, 153, which recognized that the shareholders' right to examine corporate books was supplemental to the state's visitorial power

tain "no element of personal privacy" to which the privilege against self-incrimination could attach (322 U.S. at 700).[17]

b. Having concluded that the records of unincorporated associations are to be treated in essentially the same manner as those of a corporation for purposes of the Fifth Amendment privilege against self-

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and was "* * * the same right as [that of] the members of an ordinary partnership to examine their company's books * * *."

The Court in *White* also cited (322 U.S. at 699) *United States* v. *Invader Oil Corp.*, 5 F. 2d 715 (S.D. Cal.), which held the privilege inapplicable to the records of certain unincorporated commercial trusts. That decision was based in part upon the general requirement of the law of trusts, reflected also in the trust instrument, entitling the various investors to inspect the trust's records. See 5 F. 2d at 717.

[17] Petitioner therefore errs in relying (Br. 14) on the element of possession as emphasized in *United States* v. *Cohen*, 388 F. 2d 464 (C. A. 9). There, the allowance of the claim of privilege was based on the court's holding that the papers in the possession of the claimant's accountant embodied the claimant's "purely personal affairs." *Id.* at 471. But the court recognized that this Court's decisions in *Hale* and *White* established "an exception applicable to the records of a corporation or other impersonal organization," so that "the production of such records may be compelled even though a natural individual claiming privilege has acquired both possession and title." *Id.* at 470–471. See, also, *United States* v. *Egenberg*, 443 F. 2d 512, 518 (C.A. 3). And see American Law Institute Model Code of Evidence, Rule 206:

"No person has a privilege under Rule 203 [self-incrimination] to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control constituting, containing or disclosing matter incriminating him if the judge finds that, by the applicable rules of the substantive law, some other person or a corporation, or other association has a superior right to the possession of the thing ordered to be produced."

incrimination, the Court in *White* stated that the test is (322 U.S. at 701):

> * * * whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.[18]

Petitioner urges (Br. 16, 25–28) that under this test the records of a three-partner law firm are protected by the privilege. However, the Court's formulation, which refers to the scope of both the membership and the activities of the organization, cannot be reduced to a simple proposition based based upon its size.[19] Indeed, it is difficult to know precisely what situations the formulation in *White* was intended to include within the protection of the privilege, since the Court has never to our knowledge, either before or after that decision, held any particu-

[18] This formulation is, however, essentially dictum to which three members of the Court who noted their concurrence in the result (Roberts, Frankfurter and Jackson, JJ.) apparently did not subscribe.

[19] It is well settled that corporate records, which would tend to incriminate a corporate officer, are not privileged even when the corporation is a mere *alter ego* of its owner. *Grant* v. *United States*, *supra*; *Fineberg* v. *United States*, 393 F. 2d 417 (C.A. 9); *Hair Industry, Ltd.* v. *United States*, 340 F. 2d 510 (C.A. 2). Cf. *Campbell Painting Corp.* v. *Reid*, 392 U.S. 286.

lar organizational or associational records to be subject to a claim of the privilege by their custodian.

One possibility that occurs to us, if the *White* test is to be given meaningful content, would be to make the test coextensive with associational relationships with respect to which the law recognizes testimonial privileges. For, in the absence of testimonial privilege, there ordinarily would be little purpose served by honoring a self-incrimination claim by one member of the group with respect to the group's records, since the government could instead compel their production by another member who could not claim that their production would tend to incriminate him (whether because of a grant of immunity or because such a claim would otherwise be without factual basis).[20] And whether confidential communications between members of the group are protected from compulsory disclosure does seem highly relevant to the question whether the associational relationship can accurately be characterized as "a private enclave" where the members are legally entitled to "lead a private life * * *" (*Murphy* v. *Waterfront Commission, supra,* 378 U.S. at 55). Perhaps under the test the privilege might also be assertable by the custodian of the records of an informal group, such as an ordinary criminal conspiracy, with respect to which the law recognizes no rights among the members (and in which it is therefore unclear whether the records

[20] The association would not be entitled to frustrate his compliance with legal process by attempting to cut off his right of access to the records. See *Couch, supra,* 409 U.S. at 329 n. 9.

meaningfully "belong to" anyone other than their custodian at any given time).

No such factors are present with respect to the business records of a partnership, such as those at issue here. It is well established that confidential communications between partners are not privileged from compelled disclosure. 8 Wigmore, *Evidence* (McNaughten rev.) § 2286; see *United States* v. *Onassis,* 133 F. Supp. 227, 331–332 (S.D. N.Y.). See, also, 59 Purdon's Pa. Stat. Ann., § 33 (providing that an admission or representation made by any partner concerning partnership affairs within the scope of his authority is evidence against the partnership). Moreover, under Pennsylvania law, partnership books and records are required to be maintained and made available for inspection by all the partners (59 Purdon's Pa. Stat. Ann., § 52), the partners are required to render among themselves any information pertaining to the partnership business (59 Purdon's Pa. Stat. Ann. § 53), and any partner is entitled to an accounting with respect to any transaction connected with the conduct or liquidation of the partnership (59 Purdon's Pa. Stat. Ann. § 54).

These legal attributes of the partnership relationship, common to all partnerships, are, in our view, more significant for purposes of the question presented in this case than are the numerous possible differences in the size of partnerships or their manner of conducting business. Indeed, on all the occasions since *White* when this Court has considered the issue, it has held that the records of an unincorporated as-

sociation were not privileged under the Fifth Amendment without discussion of the number of members of the organization. See *McPhaul* v. *United States,* 364 U.S. 372, 380; *Curcio* v. *United States,* 354 U.S. 118. See, also, *Campbell Painting Corp.* v. *Reid, supra; Rogers* v. *United States,* 340 U.S. 367; *United States* v. *Fleischman,* 339 U. S. 349; *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186. While none of these cases involved partnership records, the legal attributes of partnerships (which are discussed further at pp. 29–33, *infra*) give them an independent group identity which does not differ significantly for present purposes from the characteristics of associations such as, for example, the Civil Rights Congress involved in *McPhaul.* Accordingly, even though the district courts have divided on the issue,[21] all the courts of appeals which have considered the question have agreed with the court below that the privilege does not apply to partnership records, at least in the situations then before each court. *In re Mal Brothers Contracting Co.,* 444 F. 2d 615 (C.A. 3), certiorari denied, 404 U.S. 857; *United States* v. *Silverstein,* 314 F. 2d 789 (C.A. 2), certiorari denied, 374 U.S. 807;[22]

[21] The cases are collected in petitioner's brief (p. 29, n. 11).

[22] There the court upheld against a claim of the privilege an order enforcing an Internal Revenue summons directed against one of *three general partners,* all of whom were members of the *same family,* who directed a real estate and rental management enterprise. Although the court noted that the considerable size of the business and the interests of numerous limited partners in each of the ventures made it analogous to a group of cor-

United States v. *Wernes*, 157 F. 2d 797 (C.A. 7).[22]

It is our submission, in short, that the records of a business or professional partnership, like those of a corporation or of a labor union or other association, are not subject to a claim of the privilege against self-incrimination by their custodian as a ground for resisting their production. Moreover, as we shall now show in detail, the particular partnership books and records involved here reflect the business of the partnership entity rather than any personal and private interests of petitioner as an individual.

C. THE BOOKS AND RECORDS AT ISSUE HERE REFLECT THE PARTNERSHIP BUSINESS RATHER THAN ANY PERSONAL OR PRIVATE INTEREST OF PETITIONER AS AN INDIVIDUAL

The grand jury subpoena at issue here in this case applies only to "partnership records * * * for the partnership of Bellis, Kolsby & Wolf * * *" (A. A6). Despite the fact that the persons who had a financial

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porations, the records of which are not privileged, it nevertheless drew the *White* distinction between purely private or personal records and the representative possession of records of "corporations, limited partnerships or other entities." 314 F. 2d at 791.

[23] A recent district court decision, *In re Grand Jury Subpoena Duces Tecum*, 358 F. Supp. 661 (D. Md.), involved facts almost identical to those in the instant case. In a thoughtful opinion discussing the relevant authorities in some detail, the court rejected the asserted claim of privilege and the privilege-claimant's contention that "a law firm having four partners is a small personal organization merely because it has only four members" (358 F. Supp. at 666). It held that because of the legal attributes of a partnership, reflected in the Uniform Partnership Act (applicable in that case as it is here), "any records belonging to the partnership are possessed by a partner in a purely representative capacity" (358 F. Supp. at 668).

interest in the Bellis, Kolsby, and Wolf partnership were few in number, the essential nature of the association does not support petitioner's claim of privilege with respect to the partnership books and records. Petitioner urges (Br. 26–27) that his former partnership was intimate and reflected only the personal interests of the members. But these are bare assertions without support in the record. It was, of course, incumbent on petitioner to introduce sufficient evidence to show that he qualifies as a proper person to claim the privilege.

In any event, the record effectively refutes the existence of an intimate and personal association. To begin with, the partnership in question was not an informal association or a temporary arrangement for the undertaking of a few projects of short-lived duration. Rather, it was a formal arrangement organized for the active conduct of a trade or business and had been in existence for almost 15 years prior to its dissolution.[24] During that period, it maintained

[24] Petitioner concedes (Br. 31, n. 12) that the fact of the dissolution of the partnership does not afford him any greater claim to the privilege. Under Pennsylvania law (59 Purdon's Pa. Stat. Ann. § 92), the dissolution of the partnership does not of itself completely terminate the entity; it continues until the winding up of the partnership affairs, which petitioner states (Br. 3) has not yet been completed.

Moreover, the result would appear to be the same in any event under this Court's decision in *Grant* v. *United States*, *supra*, holding that the records of a dissolved corporation in the possession of its sole shareholder are not eligible for the privilege because the records retain their "essential character" as corporate documents (227 U.S. at 80). See also *Wheeler* v. *United States*, 226 U.S. 478, 490; *Curcio* v. *United States*, 354 U.S. 118, 122.

a bank account in the name of the partnership, had firm stationery, and thereby held itself out to third parties as an impersonal entity with an independent group identity (A. A83, A91, A93). During the period of its existence, the revenues of the firm supported three attorney-partners, who were not related to each other by family ties, one attorney-employee, three or four secretaries, and an additional person employed for miscellaneous duties (A. A82–A83, A87, A89).

Moreover, the books and records at issue were maintained in a manner which indicates that they were ordinary partnership records rather than petitioner's own personal papers. A variety of persons other than petitioner were given access to the records, including his two partners, his secretary-office manager, his accountant, and the accountant's staff (A. A91).[25] The two other partners had, and continue to have, the legal right of access to the records and can subpoena them in a suit for an accounting (see p. 23, *supra*). Cf. *Perlman* v. *United States,* 247 U.S. 7; *Dier* v. *Banton,* 262 U.S. 147.

Indeed, the record here shows much more than an unexercised legal right of petitioner's two partners to inspect the records. The evidence (summarized in the Statement, *supra*) shows that petitioner's conduct with respect to the records was so casual as to be hardly consistent with his claim of privacy in them. Not only did he freely permit his partners and others

[25] There is of course no confidential accountant-client privilege under federal law and no state-created privilege has been recognized in federal cases. See *Couch* v. *United States*, *supra*, 409 U.S. at 335, and cases cited therein.

to gain access to the records, he left them with his former partners for a period of more than three years after he departed from their offices. In so doing, petitioner abandoned control over the records and in effect allowed anyone to have access to them.[25] During that period, the records were physically located in the office of Kolsby—hardly a private enclave of petitioner's—and petitioner's secretary freely consulted with his former partners with respect to details in the books and records. They were removed from Kolsby's office only in late February or early March 1973, shortly before the issuance of the grand jury subpoena on May 1, 1973.

To be sure, Kolsby and Wolf knew when petitioner's secretary began to remove the records from their offices and made no objection at that time (A. A86–A87, A97–A98). But there was no understanding on anyone's part that the books and records would not be returned—let alone that they were petitioner's personal papers. Moreover, the record further indicates that Kolsby and Wolf unsuccessfully tried to make the partnership records available to the grand jury (A. A13). It hardly seems appropriate to permit petitioner to raise the bar of the privilege simply on account of his physical possession of the records when his part-

[25] Although petitioner speculates (Br. 12) that under the government's argument he could "never let the books out of his sight," the facts here demonstrate that the removal of the books from his dominion and control "was no mere fleeting divestment of possession * * *." *Couch*, *supra*, 409 U.S. at 334. Nor were petitioner's former partners holding the books in a custodial capacity for him. Cf. *United States* v. *Guterma*, 272 F. 2d 344 (C.A. 2).

ners, who have equal rights in the records, wished to cooperate with the grand jury investigation. Indeed, the contrast between petitioner's refusal to comply with the subpoena and his partners' willingness to cooperate is in itself a confirmation that the partnership is not a mere extension of petitioner's personal interests, but is instead a business association whose records petitioner holds in a mere custodial capacity. Petitioner's claim of privilege with respect to these records was therefore correctly rejected by both courts below.

D. ADDITIONAL ASPECTS OF THE LAW OF PARTNERSHIPS AND THEIR TAX TREATMENT UNDER THE INTERNAL REVENUE CODE PROVIDE FURTHER SUPPORT FOR THE DECISION BELOW

In light of the foregoing discussion, we submit that the legal attributes of petitioner's partnership relationship, as well as his conduct with respect to the maintenance of the books and records at issue, effectively refute his claim to the privilege under this Court's *White* and *Couch* decisions. There are, however, additional aspects of the law of partnerships and their federal tax treatment which provide further support for the conclusion that a partnership is a juridical entity independent of its members, not substantially different from a corporation[37] or other association for Fifth Amendment purposes.

[37] We note the growing tendency of professional men such as lawyers and physicians to conduct their business affairs as a corporation. Indeed, every state has now enacted professional incorporation statutes. See BNA Tax Management Portfolio No. 227, *Professional Organizations—General Coverage*, p. A–40 and p. 3 of Changes and Additions (1973 ed.).

For example, the Uniform Partnership Act, as enacted in Pennsylvania,[28] essentially regards a partnership as a collective organizational entity with a disparate form of management and established legal procedures for the resolution of disputes among its members. See, *e.g.*, 59 Purdon's Pa. Stat. Ann., § 51 (e) and (h). Such institutionalized procedures at the least indicate that the law contemplates no necessary identity of interest between one partner and the partnership itself, and that no individual partner is entitled to singular control or unqualified privacy with respect to partnership books and records.

So much is in any event clear from the fact that individual partners have no immediate or direct interest in partnership property. 59 Purdon's Pa. Stat. Ann., §§ 13, 71–73; *Ellis* v. *Ellis*, 415 Pa. 412, 415–416, 203 A. 2d 547, 549–550. Rather, under Pennsylvania law and the law of partnerships generally, partnerships can hold and sell property in their own name and such property belongs to the partnership. 15 Purdon's Pt. Stat. Ann. § 12773. "[T]he interest of each partner is a resulting interest, the value of which can be ascertained only by an accounting." *Zion* v. *Sentry Safety Control Corp.*, 258 F. 2d 31, 34 (C.A. 3). See *Clarke* v. *Railroad Co.*, 136 Pa. 408, 409–410, 20 Atl. 562. Although a partner is a co-owner of specific partnership property as a tenant in partnership, he has "an equal right with his partners to possess spe-

[28] The Uniform Partnership Act has been adopted in 41 States and the District of Columbia. The exceptions are Alabama, Florida, Georgia, Hawaii, Kansas, Louisiana, Maine, Mississippi and New Hampshire. See Uniform Laws Annotated, Uniform Partnership Act, 1972 Cumulative Annual Supplement, p. 5.

cific partnership property for partnership purposes [only and] * * * has no right to possess such property for any other purpose without the consent of his partners." 59 Purdon's Pa. Stat. Ann. § 72 (1) and 2(a). Finally, a partnership may sue or be sued in its own name (15 Purdon's Pa. Stat. Ann. § 12773),[29] and this right extends to suits "against one or more of the partners" or suits by "one or more partners * * * against the partnership" (12 Purdon's Pa. Stat. Ann., Rule 2129).[30]

These statutory provisions suggesting that a partnership such as petitioner's law firm is a discrete legal

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[29] See, *e.g.*, *Cravath, Swaine & Moore* v. *United States*, No. 73–1066, presently pending an appeal.

[30] Various other provisions of Pennsylvania law accord partnerships the status of juridical personalities. See, *e.g.*, the Uniform Securities Act (70 Purdon's Pa. Stat. Ann., § 1–102 (n)); the Unit Property Act (68 Purdon's Pa. Stat. Ann., § 700.102); the tax for education (72 Purdon's Pa. Stat. Ann., § 7201); the personal income tax (72 Purdon's Pa. Stat. Ann., § 7301), and the Human Relations Act (43 Purdon's Pa. Stat. Ann., § 954). A partnership is also considered an "employer" under the Pennsylvania Workmen's Compensation Act. 77 Purdon's Pa. Stat. Ann., § 21. And the Pennsylvania Supreme Court has recently recognized the independent existence of a partnership, in holding that a foreign partnership could be properly served in that Commonwealth by service upon one of its employees (not a partner). It stated (*Goldstein* v. *Carillon Hotel*, 424 Pa. 337, 341, 227 A.2d 646, 648) that:

> The matters to be considered in determining whether an entity is doing business in the Commonwealth are the same * * * whether the entity be a corporation or a partnership.

Moreover, in promulgating Rule 17(b) of the Federal Rules of Civil Procedure, this Court has recognized that a partnership is a discrete juridical entity, at least for federal question purposes, even in circumstances where local law is to the contrary.

entity are complemented by the provisions in the Internal Revenue Code of 1954 governing the taxation of partnerships. Prior to the enactment of Subchapter K of the Internal Revenue Code of 1954, a partnership was considered to have a "dual nature;" sometimes it was treated as "an aggregate of individual co-owners of property used for a common purpose," and at other times "as a single business entity." Jackson, Johnson, Surrey, Tenen & Warren, *The Internal Revenue Code of 1954: Partnerships,* 54 Colum. L. Rev. 1183 (1954).

Subchapter K of the Internal Revenue Code of 1954 was the first comprehensive statutory treatment of partners and partnerships in the history of the income tax law. "Instead of rigidly adhering to either an aggregate or entity theory, the new law attempt[ed] to incorporate the best features of both approaches" (*id.* at 1236) and explicitly treats a partnership as an entity in respects relevant to this case. For example, Section 6031 of the Internal Revenue Code of 1954 requires partnerships to file their own informational tax returns;[21] Section 706 provides for the partnership's own taxable year and its own accounting system; Sections 705 and 741 provide that the basis of a partner's interest in the partnership is distinct from the partnership's basis in its own property; Section 743 provides that a partner may sell his interest in the partnership without disturbing the partnership's basis in its assets; Section 704(c) generally adopts

[21] The mere co-ownership of property, which is maintained, kept in repair, and rented or leased does not constitute a partnership for tax purposes and does not require the filing of an informational return. See Treasury Regulations, Secs. 1.761–1(a), 1.6031–1(a)(1).

the entity approach for the treatment of contributed property; Section 707(a) specifically adopts the entity approach by generally providing that if a partner engages in a transaction with his partnership, other than in his capacity as a partner, the transaction shall be considered as occurring between the partnership and a stranger; and Section 707(c) applies the entity concept to guaranteed annual payments of salary and interest. See, generally, Jackson, Johnson, Surrey, Tenen & Warren, *supra,* at 1200–1208).[22]

Thus, Subchapter K of the 1954 Code fundamentally adopts the concept that a partnership is an independent legal entity, in conformity with the basic approach of the almost universally adopted Uniform Partnership Act. In similarly relying on the entity concept, therefore, the decision below comports with the essential realities of modern partnership law—in addition to its specific support in the particular legal attributes of partnerships previously discussed.

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[22] In *United States* v. *Basye*, 410 U.S. 441, 448, n. 8, the Court held that for the purpose of reporting its income, the partnership there involved was "regarded as an independently recognizable entity apart from the aggregate of its partners." After noting that there was considerable discussion in the briefs and in the lower court opinions with respect to whether a partnership is to be viewed as an "entity" or as a "conduit", the Court stated that it found itself "in agreement with the Solicitor General's remark during oral argument when he suggested that '[i]t seems odd that we should still be discussing such things in 1972.' " See also *United States* v. *A & P Trucking Co.*, 358 U.S. 121. Of course, the fact that partnerships are not viewed *solely* as entities is immaterial. *United States* v. *White*, *supra*, 322 U.S. at 697, 699–701.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 73-190.

IN THE

Supreme Court of the United States

October Term, 1973.

ISADORE H. BELLIS,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR THE PETITIONER.

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REPLY BRIEF FOR THE PETITIONER.

1. COUNTER STATEMENT OF THE FACTS.

The Government in an attempt to buttress its argument slants the facts in an impermissible way by suggesting that the Petitioner's former two law partners made an unavailing demand on Petitioner to return the records (Br. 6) and unsuccessfully tried to make the partnership records available to the Grand Jury (Br. 28).

The support for these statements, completely rejected by both of the Courts below, is claimed to exist in a memorandum of law prepared and filed by the Government's trial attorney prior to the evidentiary hearing. Contrary to the veiled suggestion that because Petitioner did not specifically deny these factual allegations in its memorandum to quash the subpoena it must be deemed to have acquiesced in their truthfulness, it should be observed that Petitioner's memorandum was also filed in advance of the evidentiary hearing

and counsel for Petitioner made it clear at the hearing that the factual matters claimed by the Government were not correct (A. 32); that prior to the hearing, Petitioner had no opportunity to dispute or deny them (A. 35, 40); that the witnesses on the issue should be produced and exposed to cross-examination (A. 55) (which the Government refused to do (Br. 6)); and that "they [the Government] haven't even come forward with any suggestion that this is not with the complete consent and authorization of the other partners. Nothing has been adduced. You must find that that is so. They waived their right to proceed" (A. 114).

Petitioner can understand that the Government would prefer to present to the Court as the question for decision, the *wrongful* possession of books and records by one member of a partnership in opposition to his other partners. However, this was obviously rejected by both the District Court and the Court of Appeals and the question on which this Court granted certiorari was, as stated by the Court below, "whether an individual partner, assumedly in *lawful* possession of the partnership records of a dissolved partnership, may refuse to produce such records on the grounds that such production would violate his Fifth Amendment rights (A. *15) (Italics supplied).

2. COUNTER ARGUMENT.

A. Demonstrating its apparent concern for the correctness of Petitioner's conclusion that if the instant three-man law partnership cannot qualify under the test of *United States v. White*, 322 U. S. 694 (1944), nothing can, the Government advances an interpretation which no legitimate business or professional partnership or joint enterprise can possibly meet (Br. 22-23). Indeed, the only example of regularly conducted group activity the Government could think of which would meet its own interpretation of

the *White* test is an ordinary criminal conspiracy. It hardly seems likely that this Court in *White* had in mind only illegitimate or criminal organizations when it created the rule.

Thus, the Government comes up with a novel proposition, in substitution rather than in exposition of the *White* formulation, that the proper test is to make the Fifth Amendment privilege for books and records applicable only in those associational relationships where the law recognizes testimonial privileges. This indeed is a startling thought, since it would mean that unless Petitioner went into the partnership with his doctor (or maybe only his psychiatrist),[1] or his clergyman,[2] or his lawyer,[3] where privileges against disclosure of communications made in confidence are generally recognized when made for purposes of medical, spiritual or professional treatment or advice, there could be no privilege against self-incrimination because testimony could be obtained from another member of the group.

Fundamentally, this approach cannot be well taken for it attacks the very heart of the Fifth Amendment—the element of personal compulsion. The fact that the Government could compel production of the books and records from another member of the group, if he had them and wanted to give them up, seems hardly relevant on the issue as to whether a partner's constitutional rights are impinged by compelling him personally to produce the records which might incriminate him.

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1. Proposed Rules of Evidence for the United States District Courts and Magistrates, 1971 revised draft, Rule 504.

2. *Ibid.*, Rule 506.

3. *Ibid.*, Rule 503. Further, the Government conveniently overlooks the fact that the instant partnership is a law partnership although obviously Petitioner is not the client of his law partners.

In essence, the very attributes which the Government finds present in a partnership, compels rather than precludes the conclusion that the Fifth Amendment privilege should apply. The personal and intimate relationship and scope of the activities of the partners are such that notice to one partner is notice to all,[4] the admissions made by a partner concerning partnership affairs are admissible as admissions against the others,[5] a partner is unlimitedly and personally liable for loss or injury caused to third persons by the wrongful acts of his co-partner in the ordinary course of the business of the partnership[6] and each partner is accountable to his co-partners as a fiduciary.[7] It is submitted that these attributes serve to illustrate how identical and dependent are the interests of each of the law partners on the others in a small law partnership such as is involved in this case.

Moreover, we think the reasons why for so many years lawyers were not permitted to incorporate are more demonstrative of the true nature of a law firm (i.e. that it is an aggregate of individual lawyers as opposed to an independent legal entity), than any of the authorities cited by the Government. See generally, *Ethics and the Pennsylvania Professional Associations Act*, 110 U. Pa. L. Rev. 465-472 (Jan. 1962); Note, *An Introduction to the Professional Associations Act*, 35 Temp. L. Q. 312 (1962); Opinion No. 303 of the ABA Committee on Professional Ethics and Grievances (Nov. 27, 1961).

The major obstacles which prevented professional incorporation by lawyers can be found in the American Bar Association Cannons of Professional Ethics, applicable to

4. 59 Purdon Pa. Stat. § 34.
5. *Ibid.*, § 33.
6. *Ibid.*, § 35.
7. *Ibid.*, § 54.

all lawyers no matter how they associate. Cannon 34 provides in substance that a division of fees must bear relationship to the lawyer's individual service or responsibility. Cannon 35 insures the preservation of direct and personal relationships between attorney and client and prohibits the professional services of a lawyer from being controlled or exploited by any lay agency, personal or corporate, which intervenes between the lawyer and the client.

Thus, in order to operate under the Cannons of Professional Ethics, a law firm must be considered as an aggregate of its individual members in these significant aspects—it cannot be an independent impersonal entity. To comply with Cannon 35, lawyers must be permitted to operate personally and individually even though their association may be called a partnership. Additionally, in that the books and records must reflect the individual activities of each partner in order to comply with Cannon 34, they reflect each law partner's individual activity and are in this sense individual property.

B. Petitioner finds it difficult to understand how Sub-Chapter K of the Internal Revenue Code of 1954 governing the taxation of partnerships throws light on the Fifth Amendment inquiry here under consideration. As the Government recognizes (Br. 31-33), for tax purposes, a partnership is sometimes treated as a separate entity having an existence distinct from that of the individuals who are its partners and on other occasions is considered merely an aggregate of individual co-owners of property who use it for a common purpose. These two approaches, commonly called the entity and aggregate theories have found expression in cases and rulings as well as in the statutory provisions. If the Government wishes to engage in a battle of numbers, the aggregate approach can be seen in the rule that a partnership is not a taxable entity, no tax is imposed

at the partnership level, instead each partner pays tax on his distributive share of profits just as though he realized the income individually.[8] Taxable items such as capital gains, Section 1231 gains, dividends and others retain their character in the hands of the partners who add them to like items of their own.[9] Thus, the aggregate theory makes the partnership a conduit through which income flows to tax paying partners. Interestingly enough, the Code does not provide which theory is to be followed where none is specified. The aggregate or entity theory applies only as it is found in a particular section.[10]

Moreover, the law partnership of which Petitioner was a member, was the creature of and owed its life to Pennsylvania law. However the Government would like to interpret the Uniform Partnership Act, unfortunately for it, the Supreme Court of Pennsylvania has the final say on Pennsylvania attributes. To the extent local characteristics have significance, "state law creates [these] legal interests and rights". *Morgan v. Commissioner*, 309 U. S. 78 (1940).

For purposes of Pennsylvania law, the dispute between the entity and aggregate theories of partnerships has been definitively settled. In *Tax Review Board of the City of Philadelphia v. D. H. Shapiro Company*, 409 Pa. 253 (1962), the Supreme Court of Pennsylvania, in holding that a Philadelphia based accounting partnership having its sole office in Philadelphia but with some non-resident partners performing part-time accounting services in suburban Philadelphia areas, was not subject as an entity to the Philadelphia net profits tax on the fees for these out of city services, said (p. 260)

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8. Int. Rev. Code § 701.

9. Int. Rev. Code § 702.

10. Pennell & O'Bryne, Federal Income Taxation of Partners and Partnerships (American Law Institute, 1971).

"'We deem it to be the law in Pennsylvania and the approved opinion in most other jurisdictions that a partnership is not recognized as an entity like a corporation, that it is not a legal entity having as such a domicile or residence separate and distinct from that of the individuals who compose it. It is rather a relation or status between two or more persons who unite their labor or property to carry on a business for profit. This is subject to an apparent exception, for while a partnership as such is not a person, it, as a matter of fact, is treated by a legal fiction as a quasi person or entity for such purposes as keeping of partnership accounts and marshalling assets. * * * Until the promulgation of P. R. C. P. 2128, a partnership could not be sued in its firm name, and even yet, under P. R. C. P. 2127, partners must be named individually in actions by a partnership.'" [Morrison's Estate, 343 Pa. 157, 162 (1941).]

See also: McElhinney v. Belsky, 165 Pa. Super. 546, 69 A. 2d 178 (1949); Rigutto v. Italian Terrazzo Mosaic Co., 93 F. Supp. 124 (W. D. Pa. 1950). Under the United States Internal Revenue Code, the federal income tax is imposed upon the distributive shares of each partner, and is payable by him on his individual return, the partnership's duty being limited to the filing of an information return. We could multiply authorities, but we must hold that the weight of authority in this Commonwealth is to the effect that *a partnership is treated as an aggregate of individuals and not as a separate entity. . . .*" (Italics supplied.)

The books and records of this small closely-held three-man law partnership fall within the protection from compulsory disclosure under the Fifth Amendment privilege

against self-incrimination and the judgment of the Court of Appeals ordering production of the books and records pursuant to the federal grand jury's subpoena duces tecum should, therefore, be reversed.

Respectfully submitted,

LEONARD SARNER,
Counsel for Petitioner.

BELLIS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73–190. Argued February 25, 1974—Decided May 28, 1974

Fifth Amendment privilege against self-incrimination *held* not available to member of dissolved law partnership who had been subpoenaed by a grand jury to produce the partnership's financial books and records, since the partnership, though small, had an institutional identity and petitioner held the records in a representative, not a personal, capacity. The privilege is "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records." *United States* v. *White*, 322 U. S. 694, 701. Pp. 87–101. 483 F. 2d 961, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 101.

Leonard Sarner argued the cause for petitioner. With him on the briefs was *Louis Lipschitz*.

Deputy Solicitor General Wallace argued the cause for the United States. With him on the brief were *Solicitor General Bork*, *Assistant Attorney General Crampton*, *Stuart A. Smith*, and *Meyer Rothwacks*.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The question presented in this case is whether a partner in a small law firm may invoke his personal privilege against self-incrimination to justify his refusal to comply with a subpoena requiring production of the partnership's financial records.

Until 1969, petitioner Isadore Bellis was the senior partner in Bellis, Kolsby & Wolf, a law firm in Philadelphia. The firm was formed in 1955 or 1956. There were three partners in the firm, the three individuals listed in the firm name. In addition, the firm had about six employees: two other attorneys who were associated with the firm, one parttime; three secretaries; and a receptionist. Petitioner's secretary doubled as the partnership's bookkeeper, under the direction of petitioner and the firm's independent accountant. The firm's financial records were therefore maintained in petitioner's office during his tenure at the firm.

Bellis left the firm in late 1969 to join another law firm. The partnership was dissolved, although it is apparently still in the process of winding up its affairs. Kolsby and Wolf continued in practice together as a new partnership, at the same premises. Bellis moved to new offices, leaving the former partnership's financial records with Kolsby and Wolf, where they remained for more than three years. In February or March 1973, however, shortly before issuance of the subpoena in this case, petitioner's secretary, acting at the direction of petitioner or his attorney, removed the records from the old premises and brought them to Bellis' new office.

On May 1, 1973, Bellis was served with a subpoena directing him to appear and testify before a federal grand jury and to bring with him "all partnership records currently in your possession for the partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969." App. 6. Petitioner appeared on May 9, but refused to produce the records, claiming, *inter alia*, his Fifth Amendment privilege, against compulsory self-incrimination. After a hearing before the District Court on May 9 and 10, the court held that petitioner's personal privilege did not extend to the partnership's financial books and records, and ordered

their production by May 16.[1] When petitioner reappeared before the grand jury on that date and again refused to produce the subpoenaed records, the District Court held him in civil contempt, and released him on his own recognizance pending an expedited appeal.

On July 9, 1973, the Court of Appeals affirmed in a *per curiam* opinion. *In re Grand Jury Investigation*, 483 F. 2d 961 (CA3 1973). Relying on this Court's decision in *United States* v. *White*, 322 U. S. 694 (1944), the Court of Appeals stated that "the privilege has always been regarded as personal in the sense that it applies only to an individual's words or personal papers" and thus held that the privilege against self-incrimination did not apply to "records of an entity such as a partnership which has a recognizable juridical existence apart from its members." 483 F. 2d, at 962. After MR. JUSTICE WHITE had stayed the mandate of the Court of Appeals on August 1, we granted certiorari, 414 U. S. 907 (1973), to consider this interpretation of the Fifth Amendment privilege and the applicability of our *White* decision in the circumstances of this case. We affirm.

It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. In *Boyd* v. *United States*, 116 U. S. 616 (1886), we held that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" would violate the Fifth Amendment privilege. *Id.*, at 630; see also *id.*, at 633–635; *Wilson* v. *United States*, 221 U. S. 361, 377 (1911). The privilege applies to the business records of

[1] Although the wording of the subpoena was arguably broad enough to encompass them, the District Court expressly excluded any client files from the scope of its order.

the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life. *Boyd* v. *United States, supra; Couch* v. *United States*, 409 U. S. 322 (1973); *Hill* v. *Philpott*, 445 F. 2d 144 (CA7), cert. denied, 404 U. S. 991 (1971); *Stuart* v. *United States*, 416 F. 2d 459, 462 (CA5 1969). As the Court explained in *United States* v. *White, supra*, at 698, "[t]he constitutional privilege against self-incrimination . . . is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." See also *Curcio* v. *United States*, 354 U. S. 118, 125 (1957); *Couch* v. *United States, supra*, at 330–331.

On the other hand, an equally long line of cases has established that an individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally. This doctrine was first announced in a series of cases dealing with corporate records. In *Wilson* v. *United States, supra*, the Court held that an officer of a corporation could not claim his privilege against compulsory self-incrimination to justify a refusal to produce the corporate books and records in response to a grand jury subpoena *duces tecum* directed to the corporation. A companion case, *Dreier* v. *United States*, 221 U. S. 394 (1911), held that the same result followed when the subpoena requiring production of the corporate books was directed to the individual corporate officer. In *Wheeler* v. *United States*, 226 U. S. 478 (1913), the Court held that no Fifth Amendment privilege could be claimed with respect to corporate records even though the corporation had previously been dissolved. And

Grant v. *United States*, 227 U. S. 74 (1913), applied this principle to the records of a dissolved corporation where the records were in the possession of the individual who had been the corporation's sole shareholder.

To some extent, these decisions were based upon the particular incidents of the corporate form, the Court observing that a corporation has limited powers granted to it by the State in its charter, and is subject to the retained "visitorial power" of the State to investigate its activities. See, *e. g.*, *Wilson* v. *United States*, *supra*, at 382–385. But any thought that the principle formulated in these decisions was limited to corporate records was put to rest in *United States* v. *White*, *supra*. In *White*, we held that an officer of an unincorporated association, a labor union, could not claim his privilege against compulsory self-incrimination to justify his refusal to produce the union's records pursuant to a grand jury subpoena. *White* announced the general rule that the privilege could not be employed by an individual to avoid production of the records of an organization, which he holds in a representative capacity as custodian on behalf of the group. 322 U. S., at 699–700. Relying on *White*, we have since upheld compelled production of the records of a variety of organizations over individuals' claims of Fifth Amendment privilege. See, *e. g.*, *United States* v. *Fleischman*, 339 U. S. 349, 357–358 (1950) (Joint Anti-Fascist Refugee Committee); *Rogers* v. *United States*, 340 U. S. 367, 371–372 (1951) (Communist Party of Denver); *McPhaul* v. *United States*, 364 U. S. 372, 380 (1960) (Civil Rights Congress). See also *Curcio* v. *United States*, 354 U. S. 118 (1957) (local labor union).

These decisions reflect the Court's consistent view that the privilege against compulsory self-incrimination should be "limited to its historic function of protecting only the natural individual from compulsory incrimination through

his own testimony or personal records." *United States* v. *White, supra,* at 701. *White* is only one of the many cases to emphasize that the Fifth Amendment privilege is a purely personal one, most recent among them being the Court's decision last Term in *Couch* v. *United States,* 409 U. S., at 327–328. Relying on this fundamental policy limiting the scope of the privilege, the Court in *White* held that "the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity." 322 U. S., at 699. Mr. Justice Murphy reasoned that "individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations." *Ibid.*

Since no artificial organization may utilize the personal privilege against compulsory self-incrimination, the Court found that it follows that an individual acting in his official capacity on behalf of the organization may likewise not take advantage of his personal privilege. In view of the inescapable fact that an artificial entity can only act to produce its records through its individual officers or agents, recognition of the individual's claim of privilege with respect to the financial records of the organization would substantially undermine the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege, and largely frustrate legitimate governmental regulation of such organizations. Mr. Justice Murphy put it well:

> "The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitu-

> tional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations." *Id.*, at 700 (citations omitted).

See also *Wilson* v. *United States*, *supra*, at 384–385.

The Court's decisions holding the privilege inapplicable to the records of a collective entity also reflect a second, though obviously interrelated policy underlying the privilege, the protection of an individual's right to a "'private enclave where he may lead a private life.'" *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55 (1964). We have recognized that the Fifth Amendment "respects a private inner sanctum of individual feeling and thought"—an inner sanctum which necessarily includes an individual's papers and effects to the extent that the privilege bars their compulsory production and authentication—and "proscribes state intrusion to extract self-condemnation." *Couch* v. *United States*, *supra*, at 327. See also *Griswold* v. *Connecticut*, 381 U. S. 479, 484 (1965). Protection of individual privacy was the major theme running through the Court's decision in *Boyd*, see, *e. g.*, 116 U. S., at 630, and it was on this basis that the Court in *Wilson* distinguished the corporate records involved in

that case from the private papers at issue in *Boyd*. See 221 U. S., at 377, 380.

But a substantial claim of privacy or confidentiality cannot often be maintained with respect to the financial records of an organized collective entity. Control of such records is generally strictly regulated by statute or by the rules and regulations of the organization, and access to the records is generally guaranteed to others in the organization. In such circumstances, the custodian of the organization's records lacks the control over their content and location and the right to keep them from the view of others which would be characteristic of a claim of privacy and confidentiality. Mr. Justice Murphy recognized the significance of this in *White;* he pointed out that organizational records "[u]sually, if not always, . . . are open to inspection by the members," that "this right may be enforced on appropriate occasions by available legal procedures," and that "[t]hey therefore embody no element of personal privacy." 322 U. S., at 699–700. And here lies the modern-day relevance of the visitorial powers doctrine relied upon by the Court in *Wilson* and the other cases dealing with corporate records; the Court's holding that no privilege exists "where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the [state]," 221 U. S., at 382, can easily be understood as a recognition that corporate records do not contain the requisite element of privacy or confidentiality essential for the privilege to attach.

The analysis of the Court in *White,* of course, only makes sense in the context of what the Court described as "organized, institutional activity." 322 U. S., at 701. This analysis presupposes the existence of an organization which is recognized as an independent entity apart from its individual members. The group must be relatively

well organized and structured, and not merely a loose, informal association of individuals. It must maintain a distinct set of organizational records, and recognize rights in its members of control and access to them. And the records subpoenaed must in fact be organizational records held in a representative capacity. In other words, it must be fair to say that the records demanded are the records of the organization rather than those of the individual under *White*.

The Court in *White* had little difficulty in concluding that the demand for production of the official records of a labor union, whether national or local, in the custody of an officer of the union, met these tests. See *id.*, at 701–703. The Court observed that a union's existence in fact, if not in law, was "as perpetual as that of any corporation," *id.*, at 701, that the union operated under formal constitutions, rules, and bylaws, and that it engaged in a broad scope of activities in which it was recognized as an independent entity. The Court also pointed out that the official union books and records were distinct from the personal books and records of its members, that the union restricted the permissible uses of these records, and that it recognized its members' rights to inspect them. Although the Court was aware that the individual members might legally hold title to the union records, the Court characterized this interest as "nominal" rather than a significant personal interest in them.

We think it is similarly clear that partnerships may and frequently do represent organized institutional activity so as to preclude any claim of Fifth Amendment privilege with respect to the partnership's financial records. Some of the most powerful private institutions in the Nation are conducted in the partnership form. Wall Street law firms and stock brokerage firms provide significant examples. These are often large, impersonal,

highly structured enterprises of essentially perpetual duration. The personal interest of any individual partner in the financial records of a firm of this scope is obviously highly attenuated. It is inconceivable that a brokerage house with offices from coast to coast handling millions of dollars of investment transactions annually should be entitled to immunize its records from SEC scrutiny solely because it operates as a partnership rather than in the corporate form. Although none of the reported cases has involved a partnership of quite this magnitude, it is hardly surprising that all of the courts of appeals which have addressed the question have concluded that *White*'s analysis requires rejection of any claim of privilege in the financial records of a large business enterprise conducted in the partnership form. *In re Mal Brothers Contracting Co.*, 444 F. 2d 615 (CA3), cert. denied, 404 U. S. 857 (1971); *United States* v. *Silverstein*, 314 F. 2d 789 (CA2), cert. denied, 374 U. S. 807 (1963); *United States* v. *Wernes*, 157 F. 2d 797, 800 (CA7 1946). See also *United States* v. *Onassis*, 125 F. Supp. 190, 205–210 (DC 1954). Even those lower courts which have held the privilege applicable in the context of a smaller partnership have frequently acknowledged that no absolute exclusion of the partnership form from the *White* rule generally applicable to unincorporated associations is warranted. See, *e. g.*, *United States* v. *Cogan*, 257 F. Supp. 170, 173–174 (SDNY 1966); *In re Subpoena Duces Tecum*, 81 F. Supp. 418, 421 (ND Cal. 1948).

In this case, however, we are required to explore the outer limits of the analysis of the Court in *White*. Petitioner argues that in view of the modest size of the partnership involved here, it is unrealistic to consider the firm as an entity independent of its three partners; rather, he claims, the law firm embodies little more than the per-

sonal legal practice of the individual partners. Moreover, petitioner argues that he has a substantial and direct ownership interest in the partnership records, and does not hold them in a representative capacity.[2]

Despite the force of these arguments, we conclude that the lower courts properly applied the *White* rule in the circumstances of this case. While small, the partnership here did have an established institutional identity independent of its individual partners. This was not an informal association or a temporary arrangement for the undertaking of a few projects of short-lived duration. Rather, the partnership represented a formal institutional arrangement organized for the continuing conduct of the firm's legal practice. The partnership was in

[2] Petitioner also argues that we have already decided the issue presented in this case, and held that the Fifth Amendment privilege could be claimed with respect to partnership records, in the *Boyd* case. It is true that the notice to produce involved in *Boyd* was in fact issued to E. A. Boyd & Sons, a partnership. See 116 U. S. 616, 619. However, at this early stage in the development of our Fifth Amendment jurisprudence, the potential significance of this fact was not observed by either the parties or the Court. The parties treated the invoice at issue as a private business record, and the contention that it might be a partnership record held in a representative capacity, and thus not within the scope of the privilege, was not raised. The Court therefore decided the case on the premise that it involved the "compulsory production of a man's private papers." *Id.*, at 622. It was only after *Boyd* had held that the Fifth Amendment privilege applied to the compelled production of documents that the question of the extension of this principle to the records of artificial entities arose. We do not believe that the Court in *Boyd* can be said to have decided the issue presented today. See *United States* v. *Onassis*, 125 F. Supp. 190, 208 (DC 1954).

In any event, the Court in *Boyd* did not inquire into the nature of the Boyd & Sons partnership or the capacity in which the invoice was acquired or held. Absent such an inquiry, we are unable to determine how our decision today would affect the result of *Boyd* on the facts of that case. See *infra*, at 101.

existence for nearly 15 years prior to its voluntary dissolution.[3] Although it may not have had a formal constitution or bylaws to govern its internal affairs, state partnership law imposed on the firm a certain organizational structure in the absence of any contrary agreement by the partners;[4] for example, it guaranteed to each of the partners the equal right to participate in the management and control of the firm, Pa. Stat. Ann., Tit. 59, § 51 (e) (1964), and prescribed that majority rule governed the conduct of the firm's business, § 51 (h).[5] The firm maintained a bank account in the partnership name, had stationery using the firm name on its letter-

[3] Petitioner properly concedes that the dissolution of the partnership does not afford him any greater claim to the privilege than he would have if the firm were still active. Brief for Petitioner 31 n. 12. Under Pennsylvania law, dissolution of the partnership does not terminate the entity; rather it continues until the winding up of the partnership affairs is completed, Pa. Stat. Ann., Tit. 59, § 92 (1964), which has not yet occurred in this case. Moreover, this Court's decisions have made clear that the dissolution of a corporation does not give the custodian of the corporate records any greater claim to the Fifth Amendment privilege. *Wheeler* v. *United States*, 226 U. S. 478, 489–490 (1913); *Grant* v. *United States*, 227 U. S. 74, 80 (1913). We see no reason why the same should not be true of the records of a partnership after its dissolution.

[4] The record in this case is quite sketchy, and it is unclear whether the partnership here had adopted a formal partnership agreement. Petitioner apparently had a 45% interest in the profits of the firm, which suggests that there may have been such an agreement. However, there is no indication that any such agreement made any material change in the provisions of state law regarding the management and control of the firm or the rights of the other partners with respect to the firm's financial records. In any event, the existence of a formal partnership agreement would merely reinforce our conclusion that the partnership is properly regarded as an independent entity with a relatively formal organization.

[5] Pennsylvania has adopted the provisions of the Uniform Partnership Act, which is also in force in 40 other States and the District of Columbia.

head, and, in general, held itself out to third parties as an entity with an independent institutional identity. It employed six persons in addition to its partners, including two other attorneys who practiced law on behalf of the firm, rather than as individuals on their own behalf. It filed separate partnership returns for federal tax purposes, as required by § 6031 of the Internal Revenue Code, 26 U. S. C. § 6031.[6] State law permitted the firm to be sued, Pa. Rule Civ. Proc. 2128, and to hold title to property, Pa. Stat. Ann., Tit. 59, § 13 (3), in the partnership name, and generally regarded the partnership as a distinct entity for numerous other purposes.[7]

Equally important, we believe it is fair to say that petitioner is holding the subpoenaed partnership records in a representative capacity.[8] The documents which

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[6] As we observed only last Term, a "partnership is regarded as an independently recognizable entity apart from the aggregate of its partners" for a number of purposes under the Internal Revenue Code. *United States* v. *Basye*, 410 U. S. 441, 448 (1973).

[7] Of course, state and federal law do not treat partnerships as distinct entities for all purposes. But we think that partnerships bear enough of the indicia of legal entities to be treated as such for the purpose of our analysis of the Fifth Amendment issue presented in this case. The fact that partnerships are not viewed solely as entities is immaterial for this purpose. See *United States* v. *White*, 322 U. S. 694, 697 (1944).

[8] Petitioner argues that as a partner in the firm, he has an interest in the firm's records as co-owner which entitles him to claim the privilege against self-incrimination. But such an ownership interest exists in a partnership of any size. Moreover, the same ownership interest is presented in the case of a labor union or other unincorporated association. The Court's decision in *White* clearly established that the mere existence of such an ownership interest is not in itself sufficient to establish a claim of privilege. See also *Wheeler* v. *United States*, 226 U. S., at 489–490; *Grant* v. *United States*, 227 U. S., at 79–80.

MR. JUSTICE DOUGLAS argues in dissent that the partnership as an entity is not under investigation by the grand jury, rather that peti-

petitioner has been ordered to produce are merely the financial books and records of the partnership.[9] These reflect the receipts and disbursements of the entire firm, including income generated by and salaries paid to the employees of the firm, and the financial transactions of the other partners. Petitioner holds these records subject to the rights granted to the other partners by state partnership law. Petitioner has no direct ownership interest in the records; rather, under state law, they are partnership property, and petitioner's interest in partnership property is a derivative interest subject to significant limitations. See *Ellis* v. *Ellis*, 415 Pa. 412, 415–416, 203 A. 2d 547, 549–550 (1964). Petitioner has no right to use this property for other than partnership purposes without the consent of the other partners. Pa. Stat. Ann., Tit. 59, § 72 (2)(a). Petitioner is of course accountable to the partnership as

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tioner is the target of the inquiry. Assuming that this is true, it does not give petitioner any greater claim to the privilege. We have rejected this same argument in holding that the privilege cannot be maintained with respect to corporate records, in words fully applicable here:

"Nor is it an answer to say that in the present case the inquiry before the grand jury was not directed against the corporation itself. The appellant had no greater right to withhold the books by reason of the fact that the corporation was not charged with criminal abuses. That, if the corporation had been so charged, he would have been compelled to submit the books to inspection, despite the consequences to himself, sufficiently shows the absence of any basis for a claim on his part of personal privilege as to them; it could not depend upon the question whether or not another was accused." *Wilson* v. *United States*, 221 U. S. 361, 385 (1911).

[9] Significantly, the District Court here excluded any client files from the scope of its order. See n. 1, *supra*. A different case might be presented if petitioner had been ordered to produce files containing work which he had personally performed on behalf of his clients, even if these files might for some purposes be viewed as those of the partnership.

a fiduciary, § 54 (1), and his possession of the firm's financial records is especially subject to his fiduciary obligations to the other partners. Indeed, Pennsylvania law specifically provides that "every partner shall at all times have access to and may inspect and copy any of [the partnership books]." § 52.[10] To facilitate this right of access, petitioner was required to keep these financial books and records at the firm's principal place of business, at least during the active life of the partnership. *Ibid.* The other partners in the firm were—and still are—entitled to enforce these rights through legal action by demanding production of the records in a suit for a formal accounting. § 55.[11]

It should be noted also that petitioner was content to leave these records with the other members of the partnership at their principal place of business for more than three years after he left the firm. Moreover, the Government contends that the other partners in the firm had agreed to turn the records over to the grand jury before discovering that petitioner had removed them from their offices, and that they made an unavailing demand upon petitioner to return the records. Whether or not petitioner's present possession of these records is an unlawful infringement of the rights of the other partners, this provides additional support for our conclusion that it is the organizational character of the records and the representative aspect of petitioner's present possession of

[10] The Court in *White*, in pointing out that union records were generally open to inspection by the members, 322 U. S., at 699–700, relied upon *Guthrie* v. *Harkness*, 199 U. S. 148, 153 (1905), where the Court observed that "the members of an ordinary partnership [have the same right] to examine their company's books."

[11] To implement these rights, Pennsylvania law permits any partner to bring suit against the partnership, and the partnership to sue any partner. Pa. Rule Civ. Proc. 2129.

them which predominates over his belatedly discovered personal interest in them.

Petitioner relies heavily on language in the Court's opinion in *White* which suggests that the "test" for determining the applicability of the Fifth Amendment privilege in this area is whether the organization "has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." 322 U. S., at 701. We must admit our agreement with the Solicitor General's observation that "it is difficult to know precisely what situations the formulation in *White* was intended to include within the protection of the privilege." Brief for United States 21. The Court in *White*, after stating its test, did not really apply it, nor has any of the subsequent decisions of this Court. On its face, the test is not particularly helpful in the broad range of cases, including this one, where the organization embodies neither "purely . . . personal interests" nor "group interests only," but rather some combination of the two.

In any event, we do not believe that the Court's formulation in *White* can be reduced to a simple proposition based solely upon the size of the organization. It is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be. *Grant* v. *United States*, 227 U. S. 74 (1913); *Fineberg* v. *United States*, 393 F. 2d 417, 420 (CA9 1968); *Hair Industry, Ltd.* v. *United States*, 340 F. 2d 510 (CA2 1965); cf. *George Campbell Painting Corp.* v. *Reid*, 392 U. S. 286 (1968). Every State has now adopted laws permitting incorporation of professional associations, and increasing numbers of lawyers, doctors, and other professionals are choosing to conduct their business af-

fairs in the corporate form rather than the more traditional partnership. Whether corporation or partnership, many of these firms will be independent entities whose financial records are held by a member of the firm in a representative capacity. In these circumstances, the applicability of the privilege should not turn on an insubstantial difference in the form of the business enterprise. See *In re Grand Jury Subpoena Duces Tecum*, 358 F. Supp. 661, 668 (Md. 1973).

This might be a different case if it involved a small family partnership, see *United States* v. *Slutsky*, 352 F. Supp. 1105 (SDNY 1972); *In re Subpoena Duces Tecum*, 81 F. Supp., at 421, or, as the Solicitor General suggests, Brief for United States 22–23, if there were some other pre-existing relationship of confidentiality among the partners. But in the circumstances of this case, petitioner's possession of the partnership's financial records in what can be fairly said to be a representative capacity compels our holding that his personal privilege against compulsory self-incrimination is inapplicable.

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

Bellis, the petitioner, was formerly one of three partners in a small law firm; the partnership was dissolved, and Bellis currently has lawful possession of the firm's records. The grand jury has subpoenaed those records apparently for the purpose of a tax investigation directed against Bellis personally.* He refused to comply, claiming his Fifth Amendment privilege against self-incrimination, but the Court today holds that privilege not available to Bellis. I think the case is clearly controlled by *Boyd* v. *United States*, 116 U. S. 616, and thus I dissent.

*See App. 24; Tr. of Oral Arg. 8.

In *Boyd* the Court held that the Fifth Amendment privilege extends to the production of papers personally held as well as to the compulsion of testimony. "[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Boyd, supra*, at 633. In purporting to distinguish this case from *Boyd*, the Court relies on *United States* v. *White*, 322 U. S. 694, involving a subpoena directed to a union, not to any individual, for the production of official union documents. *White* in turn relied on cases holding that the privilege against self-incrimination is a personal one, which can be claimed only by natural persons, and not by corporations. *Id.*, at 699, citing *Hale* v. *Henkel*, 201 U. S. 43; *Wilson* v. *United States*, 221 U. S. 361; *Essgee Co.* v. *United States*, 262 U. S. 151. "[T]he papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity." *White, supra*, at 699.

In extending these corporation cases to the union papers involved in *White*, we stressed that the test is not a mechanical one, but "whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." *Id.*, at 701. In finding that the union was such an impersonal organization, the court pointed out that the union's existence is not dependent upon the life of any member, that it separately owns property apart from any of its members or officers, that its treasury exists apart from the personal funds of its members, and that without special authorization no member can bind

the union. 322 U. S., at 701–702. None of these factors are present here in this small three-man law firm. Pennsylvania, as have most States, has adopted the Uniform Partnership Act. Pa. Stat. Ann., Tit. 59, § 1. This partnership would dissolve automatically upon the death of any member, Pa. Stat. Ann., Tit. 59, § 93, and any partner can bind the entire partnership in the conduct of its affairs, Pa. Stat. Ann., Tit. 59, § 31. No new member can join without unanimous consent of the partners, § 51 (g). In Pennsylvania as in many States a partnership can hold and sell property in its own name, Pa. Stat. Ann., Tit. 15, § 12773; Pa. Stat. Ann., Tit. 59, § 13, but each partner individually is a co-owner of that property, Pa. Stat. Ann., Tit. 59, § 72, and in many substantive legal respects the ownership by the partnership is different in kind from ordinary ownership of property. Any legal liabilities arising from property owned by the partnership, of course, extend to the partners individually if the common partnership assets are exhausted. Pa. Stat. Ann., Tit. 59, § 37.

I would treat a partnership as *Boyd* treated it. This partnership is as different from a labor union or the run of corporations as black is from white. By the Court's opinion a man and wife who form a law partnership or medical partnership or dental partnership are treated as some kind of new "entity" so as to expand the power of government into an area from which the Fifth Amendment excludes it. The nature of a partnership is not even a federal question; it turns on its creator, the State. Pennsylvania tells us by its Supreme Court that a Pennsylvania partnership "is treated as an aggregate of individuals and not as a separate entity." *Tax Review Board* v. *Shapiro Co.*, 409 Pa. 253, 260, 185 A. 2d 529, 533. For federal income tax purposes the partnership pays no tax, it is merely the conduit through which income passes

to the taxpaying partners. Internal Revenue Code §§ 701, 702, 26 U. S. C. §§ 701, 702.

The majority refers to large law firms or brokerage houses as examples of partnerships which take on the characteristics of independent entities in the manner of corporations. None that I know could properly be considered an organization with "a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents," *White, supra,* at 701. That certainly is not the case presented here. At times the law may treat unlikes as if they were alike; but it surpasses understanding when a two- or three-man partnership is treated as members or officers of a giant corporation or a giant union. See *United States* v. *Cogan,* 257 F. Supp. 170 (SDNY 1966) (Frankel, J.). This small three-man firm had no real existence apart from the three individual attorneys.

All this only goes to demonstrate that Bellis was not holding the records involved here as a representative of some separate, impersonal entity with no rights under the Fifth Amendment. The records he holds are his own, in both a legal and a practical sense. Nor could the grand jury investigation result in any finding of tax liability by the partnership as a separate entity, for the partnership has no tax obligations other than the filing of informational forms that aid in determining the liabilities of the individual partners. It was only Bellis individually, or his two former partners, against whom the investigation could have been directed. If Bellis had been conducting a solo practice, his claim of privilege could not be overridden, as the Government here necessarily conceded. I am unable to perceive why he should be held to have forfeited that constitutional right by joining with two others in a partnership.

Indeed, the significance of the distinction is so obscure that the Court did not even see fit to notice it in *Boyd* itself, where in fact the subpoena was directed at a partnership and not an individual. As the Government here concedes, Brief for United States 14 n. 10, both parties and the Court assumed in *Boyd* that the partnership documents there sought were personal property.

"This command of the Fifth Amendment . . . registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.' Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit." *Ullmann* v. *United States*, 350 U. S. 422, 426. But it is the niggardly view which prevails today, with the Court effectively overruling *Boyd* in holding that the Government can compel an individual to produce his private records to aid a Government investigation of him. That is a view I cannot join.